122-306

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 258.

THE UNITED STATES EX REL: GEORGE W. HARSHMAN, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF KNOX COUNTY AND THE JUSTICES THEREOF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 18, 1884.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1883, thereof, between the United States *ex rel.* George W. Harshman, relator, and The County Court of Knox County, and the Justices thereof, respondents, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of January, in the year of our Lord one thousand eight hundred and eighty-4.

Issued at office, in the city of St. Louis, with the seal of the circuit of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this first day of February, A. D. 1884.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 1796. United States circuit court, eastern district of Missouri. United States *ex rel.* George W. Harshman *vs.* The County Court of Knox County and the Judges thereof. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 17th day of January, 1884. A. P. Selby, clerk.

3 The United States of America to The County Court of Knox County and the Justices thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The United States *ex rel.* George W. Harshman is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sam'l Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 17th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

Service of the above citation is hereby acknowledged January 17, 1884.

JAMES CARR AND
GEO. D. REYNOLDS,
Att'ys for Def'ts in Error.

4 [Endorsed:] 1796. United States circuit court, eastern district of Missouri. United States *ex rel.* Geo. W. Harshman *vs.* The County Court of Knox County and the Judges thereof. Citation. Filed Jan'y 17, 1884. A. P. Selby, clerk.

5 *Information for Mandamus.*

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the fifth day of January, A. D. 1882, there was filed in said court a certain information for a writ of mandamus in words and figures following, to wit:

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *sct:*

To the honorable judges of the circuit court of the United States in and for the said district:

Now comes George W. Harshman and relates to the court that he

is a citizen of the State of Ohio, and that the county of Knox is a county of the State of Missouri, whose financial affairs are managed by a county court composed of judges who are citizens of said State; that on the 28th day of March, 1881, relator recovered in the circuit court of the United States in and for the eastern district of Missouri a judgment against the said county of Knox for the sum of seventy-seven thousand three hundred and seventy-four and $\frac{46}{100}$ (77,374.46) dollars, part whereof, viz., the sum of sixty-seven thousand eight hundred and forty three and $\frac{92}{100}$ (67,843.92) dollars, bears interest at the rate of seven per cent. per annum, and the remainder, viz., the sum of nine thousand five hundred and thirty and $\frac{54}{100}$ (9,530.54) dollars, bears interest at the rate of six per cent per annum, together with costs, taxed at ——; that said judgment was recovered upon bonds and coupons issued by the said county in part payment of a

6 subscription made by the said county on the 9th day of June, 1867, to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of the State of Missouri; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the county court of said county, on the 12th day of March, 1867, under the 17th section of chapter 63 of the general statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy the said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law.

Wherefore relator prays the court to order that a writ of mandamus be issued, directed to the said county court of Knox county and the justices thereof, commanding them forthwith to levy a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment.

GEORGE W. HARSHMAN,
By T. K. SKINKER,
His Attorney.

7 I, Thomas K. Skinker, on oath state that I am attorney for the relator herein, and that the matters and things alleged in the above information are true, as I verily believe.

T. K. SKINKER.

Subscribed and sworn to before me this 5th day of January, A. D. 1882.

A. P. SELBY,
U. S. Commissioner, E. D. Mo.

And thereupon the following proceedings were had in said case, as appears of record, on the said fifth day of January, 1882.

Order for Alternative Writ.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now comes the relator, by attorney, and presents to the court his petition for mandamus against the said respondents commanding them to pay the judgment heretofore rendered herein against said county and in favor of said relator for the sum of $77,374.46, with interest thereon and costs; upon consideration whereof, and being fully advised in the premises, the court doth order that an alternative writ of mandamus issue herein commanding the said respondents, and directed to them, to forthwith levy a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said
8 county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment, interest, and costs, or that they show cause before this court on the first day of the next term of this court why they refuse so to do.

And thereupon there was issued in said case an alternative writ of mandamus in words and figures following, to wit:

Alternative Writ of Mandamus.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

The President of the United States of America to The County Court of Knox County and the Judges thereof, Greeting:

Whereas it has been suggested to our circuit court of the United States for the eastern district of Missouri that George W. Harshman, the relator, is a citizen of the State of Ohio; that the county of Knox is a county of the State of Missouri, whose financial affairs are managed by a county court composed of judges who are citizens of said State; that on the 28th day of March, 1881, the relator recovered in the circuit court of the United States in and for the eastern district of Missouri a judgment against the said county of Knox for the sum of seventy-seven thousand three hundred and seventy-four and $\frac{46}{100}$ (77,374.46) dollars, part whereof, viz., the sum of sixty-seven thousand eight hundred and forty-three and $\frac{92}{100}$ (67,843.92) dollars, bears interest at the rate of seven per cent. per

annum, and the remainder, viz., the sum of nine thousand five hundred and thirty and $\frac{54}{100}$ (9,530.54) dollars, bears interest at the rate of six per cent. per annum, together with costs, taxed at one hundred & twelve & $\frac{76}{100}$ dollars ($112.76); that said judgment was recovered upon bonds and coupons issued
9 by the said county in part payment of a subscription made by the said county on the 9th day of June, 1867, to the capital stock of the Missouri & Mississippi Railroad Company, a railroad company duly organized under the laws of the State of Missouri; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy the said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law:

Now, therefore, we being willing that due and speedy justice be done in the premises, do command you, The County Court of Knox County and the Judges thereof, forthwith to levy a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital thet all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said
10 judgment, or that you show cause before this court, on the 1st day of the next term thereof, to be begun and holden on the 3rd Monday, the 20th day, of March, 1882, why you refuse so to do.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 25th day of January, A. D. eighteen hundred and eighty-two.

Issued at office, in the city of St. Louis, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy Clerk.

UNITED STATES OF AMERICA, *Eastern Dist. of Missouri:*

I return on this writ that I have served the same on the within-named county court of Knox county and the judges thereof by delivering one original writ of alternative mandamus to Frank P. Hall,

clerk of the county court of Knox county, Mo., while the said county court of said Knox county was in session. Thus done and so served on the 11th day of February, 1882, at Edina, Knox county, Mo., and within the said eastern dist. of Missouri.

FELIX COSTE,
U. S. Marshal,
By BENJAMIN BOWEN,
Dep'ty U. S. M.

And afterwards, to wit, on the 23d day of March, 1882, there was filed in said cause a return to alternative writ of mandamus in words and figures following, to wit:

11 *Return to Alternative Mandamus.*

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1882.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
THE COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents.

Now at this day come the respondents, The Judges of the County Court of Knox County, Missouri, and for return to the alternative writ of mandamus issued in the above-entitled cause, or so much thereof as they are advised that it is material for them to answer, *and* admit that on the 28th day of March, 1881, George W. Harshman, the relator, recovered judgment by default against the county of Knox, in the State of Missouri, for the sum of $77,374.46; that $67,843.92 thereof bears interest at the rate of seven per cent. per annum, and the remainder of said judgment, viz., the sum of $9,530.54, bears interest at the rate six per cent. per annum, together with costs, taxed at $112.75.

That said judgment was recovered upon bonds and coupons issued by said county of Knox in part payment of two subscriptions made by said county to the capital stock of the Missouri and Mississippi Railroad Company, as hereinafter stated. But respondents expressly deny that said subscriptions, or either of them, were authorized by a vote of the people of said county, at either a general or special election held pursuant to an order of the county court of said county, on the 12th day of March, 1867, or at an other
12 time, under the 17th section of chapter 63 of the general statutes of Missouri of 1866, then in force. They deny that any special election pursuant to an order of the county court of said county, on the 12th day of March, 1867, or at any other time, was ever held under the 17th section of chapter 63 of the general statutes of Missouri of 1866, for the purpose of authorizing the county court of Knox county to subscribe to the capital stock of the Missouri and Mississippi Railroad Company. They deny that two-thirds of the qualified voters of Knox county ever voted in favor of or assented to the making of any subscription to the capital stock

of the Missouri and Mississippi Railroad Company. Respondents admit that relator requested them, as the county court of Knox county, to levy a special tax upon all property in said county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment.

That respondents have refused to levy said tax, and that the said county has no property out of which said judgment can be levied, and it has no money out of which said judgment can be paid except the fund derived from the levy and collection of a special tax of $\frac{1}{20}$ of one per cent. under the charter of the Missouri and Mississippi Railroad Company, as hereinafter stated.

Respondents, for further return to said alternative writ of mandamus, state that under and by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate
13 the Missouri and Mississippi Railroad Company," approved February 20th, 1865, the corporators therein named on the — day of September, 1866, organized under and accepted the provisions of said act, and thereby became a body politic and corporate under the name of the "Missouri and Mississippi Railroad Company."

That in and by said act said Missouri and Mississippi Railroad Company was authorized to locate and build a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon in a southwesterly direction to the Missouri river; that at the time of said county of Knox making said subscriptions and issuing the bonds with the interest coupons to the Missouri and Mississippi Railroad Company, as hereinafter stated, the county court of Knox county, under the constitution and general statutes of Missouri, had no authority to make said subscriptions or either of them and issue said bonds and coupons without the assent of two-thirds of the qualified voters of said county of Knox, given at a regular or special election held in said county for the purpose of obtaining said assent, except the authority which was conferred upon it by the 13th section of the charter of said Missouri and Mississippi Railroad Company, hereinbefore referred to, which is as follows:

"It shall be lawful for the corporate authorities of any city or town or county court of any county desiring so to do to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

14 That in and by the authority conferred upon the county court of Knox county by said section alone, and by no other authority or power, the county court of Knox county, on the 13th

day of May, 1867, subscribed the sum of $100,000 on behalf of Knox county to the capital stock of said Missouri and Mississippi Railroad Company, and issued bonds for the sums of $500.00 and $50.00 to the amount of said subscription in payment thereof; that fifty-eight of the bonds with coupons, upon which relator recovered said judgment, were dated the 1st day of February, 1868, and were of the denomination of $500.00 each and had interest coupons attached for the interest, at the rate of seven per cent. per annum, payable annually, and the bonds were payable ten years after date, at the National Bank of Commerce, in the city of New York.

That in and by the authority conferred upon the county court of Knox county by said section of said charter alone and no other authority or power, the county court of Knox county, on the 2d day of May, 1870, subscribed the additional sum of $55,000 on behalf of Knox county to the capital stock of said Missouri and Mississippi Railroad Company and issued bonds for the sums of $500.00 and $50.00 each to the amount of said subsciption in payment thereof; that sixty of the bonds with coupons, upon which relator recovered said judgment, were dated the 1st day of February, 1870, and were of the denomination of $500.00 each and had interest coupons attached for the interest at the rate of seven per cent. per annum, payable annually, and the bonds were payable ten years after date, at the National Bank of Commerce, in the city of New York.

That each of said subscriptions was made without the assent of two-thirds of the qualified voters of said county of Knox, no election regular or special, having been held in said county for the purpose of obtaining said assent, but, on the contrary, each of said subscriptions was made by the county court of Knox county against the wishes of two-thirds of the qualified voters of said county.

That said judgment in favor of relator was recovered on a portion of the bonds, with the interest coupons attached, issued by Knox county in payment of each of said subscriptions to said Missouri and Mississippi Railroad Company by Knox county as aforesaid, and it is recited on the face of said bonds that they were issued under and pursuant to orders of the county court of Knox county to the Missouri and Mississippi Railroad Company for subscription to the capital stock of said company, as authorized by "An act to incorporate the Missouri and Mississippi Railroad Company," approved Feb. 20, 1865, said recital being the only one which shows the law and authority by and under which said bonds were issued. The only part of said act which confers any authority on the county court of Knox county to make said subscriptions and issue said bonds is the 13th section thereof, which is hereinbefore recited; that neither the county court of Knox county, nor any officer or agent thereof, had any authority to make said subscriptions, or either of them, and issue said bonds, except the authority which is conferred on the county court of Knox county by said 13th section of said act, and each of said subscriptions was made, said debt contracted, and said bonds were issued by the county of Knox to said Missouri &

Mississippi Railroad Company as aforesaid with express reference to payment only out of the money derived from the levy of a special tax of $\frac{1}{2}\frac{1}{0}$ of one per cent. each year upon the assessed value of all the taxable property of Knox county as authorized by the
16 thirteenth section of the charter of the said Missouri and Mississippi Railroad Company, as hereinbefore recited.

That under and by authority of said section the county court of Knox county has, each and every year since the issue of said bonds as aforesaid, levied a special tax of $\frac{1}{2}\frac{1}{0}$ of one per cent. upon the assessed value of all the taxable property in said county and caused the same to be extended on the tax-books of said county for each year, and had said special tax collected for the purpose of paying said bonds and coupons.

That the aggregate valuation of all the taxable property of Knox county is now and always has been less than $6,000,000.00; that in and by the 11th section of the tenth article of the constitution of the State of Missouri the power of the county court of Knox [county] is limited to the following rate of taxation for county purposes, viz:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

That at the time of making each of said subscriptions and issuing said bonds, as hereinbefore stated, the county court of Knox county was, ever since has been, and still is, limited in levying taxes for county purposes by the 165th section of the 118th chapter of Wagner's Missouri Statutes, as follows:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for State purposes, but the county tax in no case shall exceed one-half of one per cent. on the taxable property."

That in and by authority of said section the county court
17 of Knox county has, each and every year since the making of said subscriptions and issuing said bonds and coupons as aforesaid, levied a tax of $\frac{1}{2}$ of one per cent. upon all property and licenses made taxable by law for State purposes for the purpose of annually defraying the expenses of carrying on and administering the government in Knox county.

That the money derived from the levy of said special tax of $\frac{1}{2}\frac{1}{0}$ of one per cent. is inadequate to pay the bonds and coupons as they mature and fall due, and the money derived from the levy of said annual tax of $\frac{1}{2}$ of one per cent., although prudently administered and economically applied, is all annually consumed in defraying the expenses of administering the government in the county of Knox.

That Knox county has no money in its treasury with which it could pay the relator's judgment; that these respondents, as judges of the county court of Knox county, have no legal authority to levy any other or greater taxes than the taxes as hereinbefore stated, and they say and aver that they have no legal authority or power to levy or cause to be collected a special tax upon all property in Knox county made taxable by law for county purposes, and upon the

actual capital that all merchants and grocers and other business men may have invested in business in said county, and, when collected, to be applied in payment and discharge of said judgment, as commanded by the alternative writ of mandamus issued herein.

Respondents say that the Missouri and Mississippi Railroad Company has never built any railroad through or into Knox county, and there is no prospect that it ever will, as it is hopelessly insolvent; and these respondents further say that the county of Knox
18 has fully complied with and performed said contract between it and said Missouri and Mississippi Railroad Company, and the holders of its bonds as aforesaid, including the relator, and they set up and plead the foregoing facts as the reasons why they refuse to levy a special tax upon all property in the county of Knox made taxable by law for county purposes, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment, as commanded by said alternative writ of mandamus.

Wherefore, having made full return to said alternative writ of mandamus, and shown good and legal reasons why they should not obey the command thereof, they ask to be discharged, with their costs incurred in making this return.

CASPER FETTERS, SEN.
JOHN CALLAWAY.

CARR & REYNOLDS,
Of Counsel.

This day personally appeared before the undersigned, clerk of the county court of Knox county, in the State of Missouri, Casper Fetters [and] John Callaway, who, being by me first duly sworn according to law, depose and say that they have read and heard read the foregoing return, and that the matters and facts as therein stated are true according to the best of their knowledge and belief.

CASPER FETTERS, SEN.
JOHN CALLAWAY.

STATE OF MISSOURI, } ss:
County of Knox, }

Subscribed and sworn to before me this 21 day of March, A. D. 1882.

[SEAL.]

FRANK P. HALL,
Clerk County Court.

19 And afterwards, to wit, on the fifth day of April, 1882, there was filed in said case the following motion to quash return in words and figures following, to wit:

Motion to Quash Return.

THE UNITED STATES *ex rel.* GEO. W. HARSHMAN, Relator,
vs.
THE COUNTY COURT OF KNOX COUNTY, Respondents.

Now comes the relator and moves the court to quash the return to the alternative writ of mandamus herein, and for reasons assigns the following:

1. The averments of the said return and the matters and things therein set fourth are inconsistent with and contradictory of the record in this case and the solemn admissions therein made by the county of Knox.

2. The record and judgment in this case forever conclude and debar respondents from denying that the bonds and coupons on which the said judgment was rendered were authorized by a vote of two-thirds of the qualified voters of said county of Knox taken at an election held pursuant to section 17 of chapter 63 of the general statutes of Missouri of 1886, then in force, and from averring that they were issued by the county court of said county in pursuance of the charter of the Missouri and Mississippi Railroad Company, upon its own mere motion and without the assent and against the will of two-thirds of the qualified voters of said county.

3. The petition in this case averred that on the 9th day of June, 1867, the county of Knox subscribed to the capital stock of
26 the Missouri & Mississippi Railroad Company—a railroad corporation duly organized under the laws of this State—the sum of $100,000; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, under the 17th section of chapter 63 of the general statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that in part payment of said subscription the said county executed and issued divers bonds with coupons for interest attached; that relator was the owner of certain of said bonds and coupons, all of which were fully and particularly described in said petition, and judgment thereon was prayed in due form; and thereupon a writ of summons was issued out of this court returnable on the third Monday, being the 21st day of March, 1881, and on the fourth day of said month the said writ was served upon the said county; and thereafter, to wit, on the 28th day of March, 1881, the said county having failed to plead to the said petition, and though duly called having made default, this court adjudged that the said writ had been served in proper time and manner, and that relator was entitled to recover as alleged in his petition, and thereupon gave judgment for him accordingly; and the said judgment is the same set forth in the informatian and alternative writ herein, and is yet in force, and relator relies upon the same as a bar to the defense set up in the said return.

T. K. SKINKER,
Attorney for Relator.

21 And afterwards, to wit, on the 22nd day of March, A. D. 1883, at a regular term of said court, the following proceedings were had and appear of record in said case, to wit:

Motion to Quash Submitted.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now come the parties, by attorneys, and the motion to quash return to the alternative writ of mandamus herein is argued and submitted.

And afterwards, to wit, on the 23rd day of March, A. D. 1883, at a regular term of said court, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Quash Return Overruled.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now come the parties, by their attorneys, and the court having considered the motion to quash the return to the alternative writ of mandamus herein, orders that said motion be overruled.

22 On the hearing of said motion to quash, the following opinion was read by his honor, Judge McCrary:

Opinion of the Court on Motion to Quash.

UNITED STATES *ex rel.* HARSHMAN
vs.
COUNTY COURT OF KNOX COUNTY.

Motion to quash return to alternative writ of mandamus.

The relator obtained judgment by default against Knox county upon certain bonds issued by the county to and in the construction of the Missouri and Mississippi railroad. It was averred in the petition in this suit upon said bonds that they were issued under certain provisions of the general statutes of Missouri in pursuance of a vote of the people. On the face of the bonds themselves it is recited that they were issued under and in pursuance of the provisions of the charter of the Missouri and Mississippi Railroad Company. For the payment of a judgment rendered upon bonds issued under the former law, it is the duty of the county court to levy a sufficient tax, but for the payment of bonds issued under the latter only one-twentieth of one per cent. per annum is authorized. The alternative writ directs the levy of a special tax sufficient to pay the judgment,

and proceeds upon the theory that the record in the suit upon the bonds conclusively shows that they were issued under the general statute. The return avers that they were issued under the charter of the company, and states that the taxes authorized thereby have been levied. The question is as to the sufficiency of this return.

T. R. Skinker, for relator; James Carr and George D. Reynolds, for respondent.

McCRARY, *Circuit Judge:*

The decision of this motion depends upon the question of the effect of the adjudication in the original suit. In the petition it was averred that the bonds were issued under the general law and in pursuance of a vote of the people. Upon the face of the bonds sued on it is declared that they were issued under and in pursuance of the provisions of the charter of the Missouri and Mississippi Railroad Company. The judgment was by default. Are we to take the allegations of the petition as to the authority under which the bonds were issued as established beyond dispute for the purposes of this proceeding or can we look to the contracts sued upon? It is well settled that the judgment in the original suit settles all questions as to the validity of the bonds, and conclusively determines that they were binding obligations of the county duly created by authority of law, and as such entitled to payment out of any fund that can lawfully be raised for that purpose. We are also satisfied that where the plaintiff's petition in the suit and the bonds sued on agree in stating that they were issued under a given statute, and this is not denied by any pleading in that suit, or, if denied, is found for the plaintiff, it will be too late in a mandamus proceeding brought to enforce the judgment to raise the question. But here there was a variance between the allegations of the petition and the recitals in the bonds sued on. The plaintiff was bound by both, unless he was prepared to aver and prove that the recitals in the bond were written there by mistake, and that the power to issue them was, in fact, derived not from the act named, but from some other. Ordinarily, a judgment by default is conclusive of the truth of all the material allegations of the petition, the establishment of which was necessary to entitle the plaintiff to the judgment rendered, but it often happens that for the purpose of determining what property is liable to be taken for the satisfaction of a judgment it is necessary to look behind the judgment and into the contract upon which it was rendered. Questions of exemption are often determined by reference to the nature of the contract or its date. As, for example, where it is sought to enforce a judgment against property claimed as homestead, it may often be necessary to recovery to go back to the contract and ascertain whether it was executed before the debtor acquired the homestead, or whether it was a debt for which the homestead was liable, or whether the homestead right has been released. And so, in a case like the present, we must, in order to determine what remedies to apply, and what measure of taxation to enforce, look into the contract upon which the judgment was rendered. The county, when sued upon its

bonds, has a right to assume that any judgment rendered will be enforced according to the law which entered into and is a part of the contract. And when mandamus proceedings are instituted for the enforcement of such a judgment, the respondents may properly raise the question as to what taxes are authorized to be levied and collected for its payment. And for the purpose of determining this question the court must go back to the contract expressed in the bonds upon which the judgment was rendered. In Ralls County *vs.* United States, 105 U. S., 733, the Supreme Court says: "While the coupons are merged in the judgment they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." If the remedies given by the original contract are to be enforced after the judgment it follows, of course, that in order to know what those remedies are, and to enforce them, we must know what the contract was. And what is the best evidence of the terms of the contract? Manifestly the contract itself, if we are permitted to look at it. But it is contended that the bonds sued on in the original suit, though filed with the clerk in accordance with the statute regulating the practice in such cases, and pursuant to a rule of this court, are no part of the record and cannot there be considered. Whatever the general rule upon this subject may be, we are of the opinion that in a case such as the present, and for the purpose of ascertaining what remedy to apply or enforce, we are at liberty to look into the terms of the contract upon which the relator's judgment was rendered, and if there is a variance between the contract and the allegations of the petition, we will presume in favor of the contract until it is shown that the recitals therein were the result of mistake or inadvertence. It is only necessary to hold that the instrument sued on and filed with the clerk in accordance with the statute and the rule of the court are a part of the record for the purpose of determining, in a case such as the present, what measure of taxation to enforce against the municipal corporation for the satisfaction of the judgment. This is all that is now decided. Were we to hold otherwise we might be called upon to command the officers of the county to levy taxes not authorized by law for the fulfillment of their contracts; or, in other words, to violate their duty and exceed their powers. And it is now well settled that a Federal court can only require of such officials obedience to the law, and cannot make a law for them. Motion to quash overruled.

Treat, district judge, concurs.

[Endorsed:] No. 1796. Opinion. Filed Mar. 23, 1883. A. P. Selby, clerk.

23 And afterwards, to wit, on the 11th day of April, 1883, there was filed in said cause the following relator's answer to respondent's return, in words and figures following, to wit:

Relator's Answer to Return.

THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN
vs.
THE COUNTY COURT OF KNOX COUNTY, Respondents.

The relator, by way of answer to the return of respondents, denies each and every allegation thereof, except that relator admits that the aggregate value of all the taxable property of Knox county is now, and always has been, less than $6,000,000; and further admits that under and by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, the corporators therein named, on the — day of September, 1866, organized under and accepted the provisions of said act, and thereby became a body politic and corporate under the name of the Missouri and Mississippi Railroad Company; that in and by said act said Missouri and Mississippi Railroad Company was authorized to locate and build a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon in a southwesterly direction to the Missouri river.

And, further answering, relator says that on the 6th day of February, 1867, the county court of Knox county made and
24 entered of record an order directing an election to be held on the Tuesday after the second Monday in March, being the 12th day of March, 1867, at the various voting precincts in Knox county to ascertain the sense of the people of said county as to whether or not they would authorize the county court of said county to subscribe stock to the amount of $100,000 to a railroad company, which might construct a railroad running from West Quincy, in Missouri, west through Knox county, to some point on the Missouri river, or in a company which might construct a railroad from Alexandria, in Missouri, southwest through Knox county, to intersect the North Missouri railroad at or near Macon City, or in any other railroad company which might duly organize under the laws of Missouri and construct a railroad through Knox county, running through Edina and connecting with the North Missouri railroad, or running to Quincy, in Illinois, or Macon, Missouri, or any point on the Missouri and Mississippi river, such stock to be taken subject to the condition that it should be payable in county bonds bearing seven per cent. interest, and running ten years, and on other conditions specified in said order.

And, further, relator says that on the 4th day of March, 1867, another and further order was made by said county court, and entered of record, whereby the said order of February 6th, 1867, was modified and amended, so as to make the town of Edina the county seat of Knox county, a point upon the railroad of any company, to the stock of which said county court should be authorized

to subscribe in case the qualified voters should at such election authorize any subscription to be made, and by said order said company was described as follows: Any railroad company which may construct a railroad running from West Quincy, Missouri,
25 thence west through Knox county, and running through Edina, the county-seat of said Knox county, to some point on the Missouri river, or in a company which may construct a railroad running from Alexandria, in this State, southwest through Knox county and through Edina, the county-seat of said Knox county, thence west to intersect the North Missouri railroad at or near Macon City, or in any other railroad company which may duly organize under the laws of this State, and which may construct a railroad running through Knox county and through Edina as aforesaid, and connecting with the North Missouri railroad, or running through Knox county and through said Edina to Quincy, Illinois, or Macon City, Missouri, or to some point on the Mississippi or Missouri river. And said order further provided that said stock should be taken subject to the condition that it should be payable in county bonds bearing seven per cent. interest and running ten years, and that all moneys arising from the sale of said bonds should be expended in the construction of a railroad within said county.

And, further, relator says that said election was duly held on the 12th day of March, 1867, being the same election referred to in the information herein; that at said election 510 votes were cast in favor of making said subscription and ninety-eight votes were cast against making said subscription; that at the time said several orders were made and said election was held the said Missouri and Mississippi Railroad Company was contemplating the construction of its said railroad from the town of Macon, in Missouri, through the said town of Edina, in the county of Knox, to the town of Alexandria, in Missouri, or the town of Keokuk, in Iowa; that in pursuance of authority in them vested by the general railroad
26 law of the State and the vote of the people aforesaid, the said county court thereafter made the said subscription of $100,000 to the capital stock of the said Missouri and Mississippi Railroad Company, and, among others, issued in payment thereof the bonds upon which relator's said judgment was obtained.

And, further, relator says that the said county court, from the time of making the said subscription and issuing said bonds down to the year 1875, never confined itself, in levying taxes to pay interest on said bonds, to the power conferred by the 13th section of said charter, but, on the contrary, levied taxes greatly in excess of the said charter limit of one-twentieth of one per cent., and levied the same under and in pursuance of power conferred alone by the general railroad law of the State, and that such levies were at the following rates, to wit:

In the year 1867, 30 cents on the $100.
In the year 1868, 33⅓ cents on the $100.
In the year 1869, 30 cents on the $100.
In the year 1870, 33⅓ cents on the $100.

In the year 1871, 50 cents on the $100.
In the year 1872, 50 cents on the $100.
In the year 1873, 25 cents on the $100.
In the year 1874, 75 cents on the $100.

That the taxes so levied were at all times fully paid by the tax-payers of said county, and the proceeds thereof were used by the said county to pay interest on the said bonds, and the interest on all the bonds issued by said county to and in aid of said railroad was fully paid, during all the years named, with the proceeds of the taxes so levied and paid.

T. K. SKINKER,
Attorney for Relator.

27 And afterwards, to wit, on the 14th day of April, A. D. 1883, there was filed in said cause the following respondent's replication to relator's answer to respondent's return, in words and figures following, to wit:

Replication to Relator's Answer.

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1883.

THE UNITED STATES *ex rel.* GEO. W. HARSHMAN
vs.
THE COUNTY COURT OF KNOX COUNTY, Respondents.

Respondents, for reply to the relator's answer filed in the above-entitled cause, deny each and every allegation in said answer which is inconsistent with the facts stated in their return filed therein, and they aver that the facts are as stated in said return, and they ask to be discharged with their costs.

JAMES CARR &
GEO. D. REYNOLDS,
Att'ys for Respondents.

And afterwards, to wit, on the 17th day of September, 1883, the following further proceedings were had and appear of record in said cause, to wit:

At Court.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

28 By consent of parties, relator files amended answer to return of respondents heretofore filed.

Said amended answer to respondents' return is in words and figures following, to wit:

Amended Answer of Relator.

THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN

vs.

THE COUNTY COURT OF KNOX COUNTY, Respondents.

The relator, by way of answer to the return of respondents, denies each and every allegation thereof, except that relator admits that the aggregate value of all the taxable property of Knox county is now, and always has been, less than $6,000,000; and further admits that under and by virtue of an act of the General Assembly of the State, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, the corporators therein named, on the — day of September, 1866, organized under and accepted the provisions of said act, and thereby became a body politic and corporate under the name of the Missouri and Mississippi Railroad Company; that in and by said act said Missouri and Mississippi Railroad Company was authorized to locate and build a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon in a southwesterly direction to the Missouri river.

And, further answering, relator says that on the 6th day of February, 1867, the county court of Knox county made and
29 entered of record an order directing an election to be held on the Tuesday after the second Monday in March, being the 12th day of March, 1867, at the various voting precincts in Knox county, to ascertain the sense of the people of said county as to whether or not they would authorize the county court of said county to subscribe stock to the amount of $100,000 to a railroad company which might construct a railroad running from West Quincy, in Missouri, west through Knox county to some point on the Missouri river, or in a company which might construct a railroad from Alexandria, in Missouri, southwest through Knox county to intersect the North Missouri railroad at or near Macon City, or in any other railroad company which might duly organize under the laws of Missouri and construct a railroad through Knox county, running through Edina and connecting with the North Missouri railroad, or running to Quincy, in Illinois, or Macon, Missouri, or any point on the Missouri and Mississippi rivers; such stock to be taken subject to the condition that it should be payable in county bonds bearing seven per cent. interest and running ten years, and on other conditions specified in said order.

And, further, relator says that on the 4th day of March, 1867, another and further order was made by said county court and entered of record, whereby the said order of February 6th, 1867, was modified and amended so as to make the town of Edina the county-seat of Knox county, a point upon the railroad of any company to the stock of which said county court should be authorized to sub-

scribe in case the qualified voters should at such election authorize any subscription to be made, and by said order said company was described as follows: Any railroad company which may construct a railroad running from West Quincy, Missouri, thence west
30 through Knox county and running through Edina, the county-seat of said Knox county, to some point on the Missouri river, or in a company which may construct a railroad running from Alexandria, in this State, southwest through Knox county and through Edina, the county-seat of said Knox county, thence west so as to intersect the North Missouri railroad at or near Macon City, or in any other railroad company which may duly organize under the laws of this State, and which may construct a railroad running through Knox county and through Edina as aforesaid and connecting with the North Missouri railroad, or running through Knox county and through said Edina to Quincy, Illinois, or Macon City, Missouri, or to some point on the Mississippi or Missouri rivers; and said order further provided that said stock should be taken subject to the condition that it should be payable in county bonds bearing seven per cent. interest and running ten years, and that all moneys arising from the sale of said bonds should be expended in the construction of a railroad within said county.

And, further, relator says that said election was duly held on the 12th day of March, 1867, being the same election referred to in the information herein; that at said election 510 votes were cast in favor of making said subscription and ninety-eight votes were cast against making said subscription; that at the time said several orders were made and said election was held the said Missouri and Mississippi Railroad Company was contemplating the construction of its said railroad from the town of Macon, in Missouri, through the said town of Edina, in the county of Knox, to the town of Alexandria, in Missouri, or the town of Keokuk, in Iowa; that in pursu-
ance of authority in them vested by the general railroad law
31 of the State and the vote of the people aforesaid the said county court thereafter made the said subscription of $100,000 to the capital stock of the said Missouri and Mississippi Railroad Company, and, among other [things], issued in payment thereof the bonds upon which relator's said judgment was obtained.

And, further, relator says that the said county court, from the time of making the said subscription and issuing said bonds down to the year 1875, never confined itself, in levying taxes to pay interest on said bonds, to the power conferred by the said 13th section of said charter, but, on the contrary, levied taxes greatly in excess of the said charter limit of one-twentieth of one per cent., and levied the same under and in pursuance of power conferred alone by the general railroad law of the State, and that such levies were at the following rates, to wit:

In the year 1867, 30 cents on the $100.
In the year 1868, 33⅓ cents on the $100.
In the year 1869, 30 cents on the $100.
In the year 1870, 33⅓ cents on the $100.
In the year 1871, 50 cents on the $100.

In the year 1872, 50 cents on the $100.
In the year 1873, 25 cents on the $100.
In the year 1874, 75 cents on the $100.

That the taxes so levied were at all times fully paid by the taxpayers of said county, and the proceeds thereof were used by the said county to pay interest on the said bonds, and the interest on all the bonds issued by said county to and in aid of said railroad was fully paid during all the years named with the proceeds of the taxes so levied and paid.

And, further, relator says that the form of the said bonds was drawn up by the said railroad company and was by it furnished to the authorities of said county, and was by them adopted and used without reflection as to the significance of any recitals therein and without any intention on the part of the said authorities or of the said county to assert that the said bonds were not issued under the general law or to waive the right of said county to levy and collect taxes under the said general law to pay said bonds and the interest thereon.

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T. K. SKINKER,
Attorney for Relator.

And afterwards, to wit, on the 19th day of September, A. D. 1883, the following further proceedings were had in said cause, to wit:

Reply to Original Answer to Stand as Reply to Amended Answer.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

On motion, it is ordered that the reply to the answer to the alternative writ of mandamus herein stand as reply to the amended answer heretofore filed.

And afterwards, to wit, on the 11th day of October, A. D. 1883, the following further proceedings were had in said cause, to wit:

Case Submitted.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now come the parties, by their attorneys—the plaintiff, by T. K. Skiner, and the defendant, by James Carr and George D. Reynolds—and this cause coming on to be heard upon certain issues, and both parties being ready, it is ordered, on motion of said attorneys, that a jury come; and thereupon come said jury, to wit, Edward E. Samuel, Henry Feurbach, Anthony Ittner, Wm. Marks, Sr., Leonard Dobbin, Thos. L. Mills, John M. Davis, Jeff.

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Boyd, John Sehan, William Washburn, Benton Kinder, and John Monteith, twelve good and lawful men, duly empanelled and sworn to well and truly try the issues as the court may hereafter submit; and, after hearing the evidence and arguments, of counsel the court submits the following issues to the jury:

"GENTLEMEN OF THE JURY: The issues of fact submitted to you are—

"First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters, voting at said election, cast their votes in favor of the subscription by the county court to the stock mentioned in said orders? Whether or not the required number of voters cast their votes at said election, if held, is conclusively established by the records of the county, behind which no inquiry of fact is permissible.

"Second. Was the subscription to stock to the R. R. Co. actually made, not, as recited in said bonds, under the charter of the M. & M. R. R. Co., but under the general law whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people; in other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence.

"The jury are instructed that to overcome the recitals in the bonds issued by the county court under its seal that the evidence
34 must be clear and positive, full and explicit, and that the burthen of proving the alleged mistake, so as to overthrow said recitals, is upon the relator in this case.

"And the court further instructs the jury that the evidence to overcome said recitals is insufficient.

"The jurors will answer said inquiries affirmatively or negatively—that is, Yes or No—to each of said inquiries.

"Under the instructions thus given the jury should answer the first inquiry, Yes; and the second inquiry, No."

Verdict.

And after receiving said instructions the said jury returned into court the following verdict:

"As to the issues submitted by the court, we, the jury, find as follows:

"On the first issue: Yes.

"On the second issue: No.

"ANTHONY ITTNER, *Foreman.*"

And afterwards, to wit, on the 1st day of November, 1883, the following further proceedings were had in said cause, to wit:

Judgment.

At Court.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now again come the parties, by their respective attorneys, in the above-entitled cause, and the court having duly considered the petition for the alternative writ of mandamus in this cause and the writ issued therein, under and by which the defendants were required to levy forthwith a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause
35 said tax to be collected in money, and when collected to be applied in payment and discharge of the judgment described in said petition and writ, or that it show cause why it refuse so to do; and the return of the defendant in said cause to said writ, as well as the answer to said return, and the reply of the defendant thereto, and the court having heretofore framed issues and submitted the same to a jury as follows:

First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the county court to the stock mentioned in said order?

Second. Was the subscription to the stock in the R. R. Co. actually made not as recited in said bonds under the charter of the M. & M. R. R. Co., but under the general law whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people?

And the jury having heard the evidence submitted on said issues, and returned into court the following verdict:

"As to the issues submitted by the court, we, the jury, find as follows:

"On the first issue: Yes.

"On the second issue: No.

"ANTHONY ITTNER, *Foreman.*"

And the court having heard and duly considered the pleadings and all the issues, as well as the evidence in the case and the verdict of the jury aforesaid and the arguments of counsel, and being now fully advised in the premises, and forasmuch as it appears to the court here by the verdict of the jury aforesaid, as well as by the evidence in the case heard by the court, that there was an
36 election held under orders of the county of Knox county, and that two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the said court to the stock mentioned in its orders, but that the subscription to the stock

of the Missouri and Mississippi Railroad Company was actually made and the bonds issued, not as alleged in the petition and alternative writ in this case, under the general law of the State of Missouri, but solely under and by virtue of act of the General Assembly of the State of Missouri entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865—

It is therefore considered and adjudged by the court that the return of the defendant to the writ is sufficient, and that said defendant has shown good and sufficient cause why a peremptory writ should not issue as prayed for; and it is therefore ordered and adjudged by the court that the relator take nothing by his said writ, and that the defendant go hence without day, and that it recover of the relator, George W. Harshman, its costs & charges herein expended, and that execution issue therefor.

And thereupon relator, by attorney, files motion to set aside verdict and judgment and for a peremptory writ.

Said motion to set aside verdict and judgment and to issue peremptory writ is in words and figures following, to wit:

Motion to Set Aside Verdict and Judgment.

THE UNITED STATES *ex rel.* HARSHMAN

vs.

THE KNOX COUNTY COURT.

The relator moves the court to set aside the verdict and
37 judgment herein, and to order the peremptory writ to issue as heretofore prayed, because—

1. The judgment of the 28th of March, 1881, recited in relator's information and read in evidence, is conclusive upon respondents, and they are precluded from averring the facts pleaded in their return.

2. The court erred in admitting evidence in support of respondents' return.

3. The court erred in instructing the jury.

4. Upon the evidence submitted the relator is entitled to the peremptory writ as prayed.

5. The recital in the bonds on which the relator's judgment is found is of no force as against him.

6. The verdict upon the second issue submitted to the jury is against the evidence and against the law.

7. The orders of the county court of Knox county, read in evidence, authorized the subscription which was made May 13th, 1867; as shown in evidence, and said subscription was made in pursuance of said orders and of the vote of the people taken thereunder March 12th, 1867, as shown in evidence, and in pursuance of the general railroad law, and the bonds on which relator's judgment is founded were likewise issued under said law and in pursuance of said vote.

T. K. SKINKER,
Att'y for Relator.

And afterwards, to wit, on the 3d day of November, 1883, at court, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Set Aside Verdict and Judgment Submitted.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

38 Now come the parties, by their attorneys, and the motion of relator is now submitted to the court, with leave to parties to file briefs herein within twenty days from this date.

And afterwards, on the 7th day of January, 1884, at court, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Set Aside Verdict and Judgment Overruled.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX CO. & JUDGES THEREOF, Respondents. } 1796.

The motion of relator for a new trial herein having been heretofore argued and submitted, and the court being now fully advised thereof, it is ordered that said motion be, and it is, overruled.

And afterwards, to wit, on the 17th day of January, 1884, at court, the following further proceedings were had in said cause and appear of record in words and figures following, to wit:

Writ of Error Allowed.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now comes the relator, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein; and the said relator also presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admon-
39 ishing said respondents to be and appear at a Supreme Court of the United States, at the next term thereof, to be begun and holden at the city of Washington on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge.

Said bill of exceptions is in words and figures following, to wit:

40 *Bill of Exceptions.*

THE UNITED STATES *ex rel.* G. W. HARSHMAN
vs.
THE COUNTY COURT OF KNOX COUNTY, Respondents.

Be it remembered that on the 11th day of October, 1883, on motion of the respondents, the court submitted to a jury the following issues of fact:

41 GENTLEMEN OF THE JURY: The issues of fact submitted to you are—

First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters, voting at said election, cast their votes in favor of the subscription by the county court to the stock mentioned in said orders? Whether or not the required number of voters cast their votes at said election, if held, is conclusively established by the records of the county, behind which no inquiry of fact is permissible.

Second. Was the subscription to stock in the R. R. Co. actually made, not as recited in said bonds under the charter of the M. M. R. R. Co., but under the general law whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people? In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence.

The jury are instructed that to overcome the recitals in the bonds issued by the county court under its seal that the evidence must be clear and positive, full and explicit, and that the burthen of proving the alleged mistake so as to overthrow said recitals is upon the relator in this case.

And the court further instructs the jury that the evidence to overcome said recitals is insufficient.

The jurors will answer said inquiries affirmatively or negatively—that is, yes or no—to each of said inquiries. Under the instructions thus given, the jury should answer the first inquiry, Yes; and the second inquiry, No.

42 In support of the affirmative of these issues the relator offered to read in evidence the petition, summons, marshal's return, and judgment herein, as follows:

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court in and for said District.

GEORGE W. HARSHMAN, Plaintiff,
vs.
KNOX COUNTY, Defendant.

The plaintiff, George W. Harshman, states that he is a citizen of the State of Ohio, and that the defendant, Knox County, is a county

of the State of Missouri; that on the 9th day of June, 1867, defendant subscribed to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of this State, the sum of one hundred thousand dollars; that said subscription was authorized by a vote of the people of said county of Knox at a special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that in part payment of said subscription defendant, by its county court, executed and issued divers bonds with coupons for interest attached; that by each of said bonds
43 defendants promised to pay to bearer at the National Bank of Commerce, in the city of New York, on the first day of February, 1878, the sum of five hundred dollars, with interest at the rate of seven per cent. per annum; that said coupons for interest were made and are payable on the first day of February of each year between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached.

Plaintiff states that he is, and at the date of their maturity was, the bearer and owner of divers of said bonds and coupons, viz., bonds numbered, respectively, 87, 102, 103, 104, 105, 106, 109, 117, 123, 125, 126, 144, 145, 147, 155, 156, 162, 163, 164, 165, 166, 168, 169, 170, 182, 185, 227, 246, 247, 248, 249, 250, 251, 65, 66, 67, 68, 69, 70, 73, 74, 75, 76, 80, 81, 83, 84, 85, 86, 111, 112, 113, 114, 143, 153, 154, 157, 158, and the coupons for interest, due on the first day of February, 1878, on each of said bonds, the said bonds being each for the sum of five hundred dollars, as aforesaid, and the said coupons being each for the sum of thirty-five dollars, as aforesaid.

Plaintiff further states that, in further payment in part of said subscription, defendant executed and issued divers other bonds with coupons for interest attached; that by each of said bonds defendant promised to pay to bearer at the National Bank of Commerce, in the city of New York, on the first day of February, 1880, the sum of five hundred dollars, with interest at the rate of seven per cent. per annum; that said coupons for interest were made payable on
44 the first day of February of each year, between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay to bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached.

Plaintiff states that he is, and at the date of their maturity was, the bearer and owner of divers of said bonds and coupons, viz., bonds numbered, respectively, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 1, 2, 3, 4, 5, 6, 18, 19, 20, 21, 22, 23, 76, 79, 80, 81, 82, 87, 90, 91, 92, 93, 94, 95, 38, 84, 85, 88, 89, and the coupons for interest due on each of said bonds on the first day of February, 1878, and also on

the first day of February, 1879, and also on the first day of February, 1880, the said bonds being each for the sum of five hundred dollars, as aforesaid, and the said coupons being each for the sum of thirty-five dollars, as aforesaid.

Plaintiff states that all of the one hundred and eighteen bonds above described and all of the two hundred and thirty-eight coupons above described are due and remain unpaid.

Wherefore plaintiff says that defendant is indebted to him in the sum of sixty-seven thousand three hundred and thirty dollars, for which, with interest on the several bonds and coupons from the maturity of each, and for costs, he asks judgment.

T. K. SKINKER,
Att'y for Plaintiff.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

45 The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon Knox County, a county and a citizen of the State of Missouri, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March, 1881, then and there to answer the complaint of George W. Harshman, a citizen of the State of Ohio, as set forth in the petition filed in said court on the third day of March, A. D. eighteen hundred and eighty-one.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 3d day of March, A. D. eighteen hundred and eighty-one.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

M. M. PRICE, *Clerk,*
By A. P. SELBY, *Deputy.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *sct:*

I return this writ that I served the same upon the defendant, "Knox County," by delivering a copy thereof, together with a copy of
46 the petition thereto attached, to Frank P. Hall, the clerk of the county court of said Knox county, at Edina, in said Knox county, and within said district, this 4th day of March, A. D. 1881.

FELIX COSTE,
United States Marshal, E. Dist. Mo.,
By BENJAMIN BOWEN, *Deputy.*

Judgment. March 28th, 1881.

GEORGE W. HARSHMAN, Plaintiff,
vs.
KNOX COUNTY, Defendant. } 1796.

Now comes the plaintiff, by T. K. Skinker, Esquire, his attorney, and the defendant, though duly served with process, fails to appear and plead to the petition herein, and although duly called makes default, and, on motion of said attorney, the default of said defendant is now here entered of record; and this action being founded upon certain bonds and coupons for interest thereon, issued by said defendant and described in the petition, the court finds that the plaintiff has sustained damages by reason of the non-payment thereof in the sum of seventy-seven thousand three hundred and seventy-four dollars and forty-six cents ($77,374.46).

It is therefore considered by the court that the plaintiff, George W. Harshman, have and recover of the defendant, The County of Knox, as well the said sum of seventy-seven thousand three hundred and seventy-four dollars and forty-six cents, the damages aforesaid by the court assessed, as also the costs herein expended, and have thereof execution.

MEMO.—$67,843.92 bears 10 %; $9,530.54 bears 6 % per annum.

47 But, on objection made by respondents, the court ruled that these papers could not be read unless the relator would also read the bonds filed with said petition.

To this ruling relator at the time excepted.

Relator then offered to read the said petition, summons, marshal's return, and judgment, and also the said bonds, and the court permitted the same to be read.

The following is a copy of one of said bonds, the others being identical in tenor and effect:

Know all men by these presents that The County of Knox, State of Missouri, acknowledges itself indebted to the Missouri & Mississippi Railroad Company (organized by an act of the General Assembly of the State of Missouri), or bearer, in the sum of five hundred dollars, which sum the said county promised to pay at the National Bank of Commerce, in the city of New York, on the first day of Feb'y, 1878, with interest at seven per cent. per annum, which interest shall be payable annually on presentation of the coupon hereto annexed at said National Bank of Commerce, in the city of New York, this bond being issued under and pursuant to order of the county court of Knox county for subscription to the stock of the Missouri & Mississippi Railroad Company as authorized by an act of the General Assembly of the State of Missouri entitled An act to incorporate the Missouri & Mississippi Railroad Company, approved Feb'y 20th, 1865.

In testimony whereof the said County of Knox has executed this bond by the presiding justice of the county court of Knox county, under the order of said court, signing his name hereto and by the

clerk of said court, under the order thereof, attesting the same and affixing the seal of said court. Thus done at the city of Edina, county and State aforesaid, this first day of Feb'y, 1868.

48 Registered [in] bond book, page 3.

JAMES C. AGNEW, *Clerk.*
W. F. PLUMMER,
Presiding Justice of the County Court of Knox County.

Relator then read in evidence sections 1, 7, and 13 of an act entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, which are as follows:

SECTION 1. A railroad company is hereby incorporated under the name and style of the Missouri and Mississippi Railroad Company, with a capital stock of four millions of dollars, divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continued succession, may sue and be sued, plead and be impleaded, defend and be defended against, in all courts in this State and elsewhere, and shall be able in law and equity to make and enter into contracts and become invested with the title to real and personal property, and to sell and convey the same for the purpose of constructing, using, and operating said railroad; may have and use a common seal, and may make such by-laws, rules, and regulations as the directors of said company may ordain and establish from time to time for the purpose of carrying this charter into effect.

SECTION 7. Said board of directors shall have full power and authority to survey, mark out, locate, and construct a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, in

49 said State, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, Missouri, and for such purpose may obtain by grant, gift, or donation any quantity of land for the purpose of a road-bed, not exceeding one hundred feet wide, depots, warehouses, machine-shops, water stations, and turnouts, and may select such route as they may think best.

SECTION 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.

50 Relator then read in evidence an order of the county court of Knox county made on the 6th day of February, 1867, as follows:

Now, at this day, is presented to the court a petition, signed by persons asking this court to order an election for the purpose of ascertaining the sense of the qualified voters of Knox county in re-

gard to this court subscribing one hundred thousand dollars for the purpose of constructing a railroad through Knox county; and the court, after hearing said petition read in open court and being fully advised in the premises, do order an election be held on the Tuesday after the second Monday in March next, at the various precincts in said Knox county, to ascertain the sense of the people of Knox county as to whether or no they do authorize the county court of the county of Knox to subscribe stock to the amount of one hundred thousand dollars to a railroad company which may construct a railroad running from West Quincy, in this State, thence west through Knox county to some point on the Missouri river, or in a company which may construct a railroad running from Alexandria, in this State, southwest through Knox county to intersect the North Missouri railroad at or near Macon City, or in any other railroad company which may duly organize under the laws of this State, and may construct a railroad through Knox county, running through Edina and connecting with the North Missouri railroad, or running to Quincy, in Illinois, or Macon, Missouri, or any point on the Missouri and Mississippi rivers, the stock to be taken being subject to the condition that it shall be payable in county bonds bearing seven per cent. interest and running ten years, and the
51 further condition that all monies arising from the sale of said bonds shall be expended in the construction of said railroad within the county of Knox aforesaid; and further ordered that public notice of this order of court be given through the Missouri Watchman for five weeks and by printed hand-bills publicly exposed thoughout the county, and further ordered that the ballots be printed or written as follows:

Shall the court subscribe one hundred thousand dollars? "Yes."
Same same same "No."

Relator next read in evidence an order of said court, made on the 8th day of February, 1867, as follows:

"It is ordered by the court that the same persons who were appointed judges of the general election in November, 1866, be, and are hereby, appointed judges of the special election to be held on the Tuesday after the second Monday in March next (12th inst.) for the purpose of ascertaining the sense of the citizens of Knox county as to this court subscribing for Knox county $100,000 in a railroad company for building a railroad through Knox county. Ordered that certificates of appointment be issued by the clerk to said judges under the seal of this court; and further ordered that the clerk make out poll-books for the several precincts in Knox county and deliver them to the sheriff of the county for distribution."

Relator next offered to read in evidence an order of said court made on the 4th day of March, 1867, as follows:

Vol. 3, page 284.

March 4th, 1867.—Now, at this day, it is ordered by the court that the order made heretofore, to wit, on the sixth day of February, 1867, in regard to the county court subscribing stock to

the amount of one hundred thousand dollars to some railroad
52 Company who may construct a railroad through Knox county be amended so as to read as follows, to wit: "The order of this court made on the 6th day of February, 1867, ordering an election to be held at the various election precincts of Knox county on the Tuesday following the second Monday in March, 1867, for the purpose of determining as to whether or no the county court should be authorized to subscribe one hundred thousand dollars to some company which might construct a railroad running through Knox county is hereby amended so as to read as follows: It is hereby ordered by the county court of Knox county that an election be held at the various election precincts in Knox county on the Tuesafter the second Monday of March, 1867, to ascertain the sense of the qualified voters of said county as to whether or not they do authorize the county court of said Knox county to subscribe stock to the amount of one hundred thousand dollars in any railroad company which may construct a railroad running from West Quincy, in this State; thence west through Knox county and running through Edina, the county-seat of said Knox county, to some point on the Missouri river; or in a company which may construct a railroad running from Alexandria, in this State, southwest through Knox county and through Edina, the county seat of said Knox county; thence west so as to intersect the North Missouri railroad at or near Macon City; or in any other railroad company which may duly organize under the laws of this State, and which may construct a railroad running through Knox county and through Edina as aforesaid, and connecting with the North Missouri railroad, or running through Knox county and through said Edina to Quincy, Illinois, or Macon City, Missouri, or to some point on the Mississippi or Missouri river, the stock to be taken to be subject to the condi-
53 tions that it shall be payable in county bonds bearing seven per cent. interest and running ten years, and that all moneys arising from the sale of said bonds shall be expended in the construction of a railroad within the county of Knox aforesaid; and further ordered by the court that the ballots or tickets voted will be marked as follows, viz:

Shall the county subscribe one hundred thousand dollars to the railroad? 'Yes.'

Shall the county subscribe one hundred thousand dollars to the railroad? 'No.'

And further ordered by the court that so much of the former order made by this court February 6th, 1867, in relation to said subscription, &c., as conflicts with this order be, and the same is hereby, revoked."

To the reading of this order in evidence the respondents at the time objected on the ground that no legal notice of the amended order of February 8th could be given before the day of election. This objection was overruled by the court and the order was permitted to be read in evidence. The respondents at the time excepted.

Relator next offered to read in evidence an entry from the records of said county court made on the 18th of March, 1867, as follows:

"In vacation: The clerk of this court, in conjunction with Joel Seever and David Bunnell, two justices of the peace within and for the county of Knox, on the 18th day of March, 1867, proceeded to count the votes cast at the special election held on the 12th day of March, 1867, at the various election precincts in Knox county,
54 for the purpose of ascertaining the sense of the legal voters of Knox county as to whether the county court should subscribe $100,000 to any railroad company who would build a railroad through Knox county and find the vote as follows:

Greensburg township, for subscription:		Yes, 32 votes; No, 11 votes.
Lynn township:		Yes, 48 votes; No, 1 vote.
Salt River township:		Yes, 31 votes; No, 38 votes.
Jeddo	"	Yes, 52 votes; No, none.
Benton	"	Yes, 101 votes; No, 4 votes.
Centre	"	Yes, 225 votes; No, 7 votes.
Fabius	"	Yes, 21 votes; No, 35 votes.

Showing by the votes recorded in the poll-books, as counted and received by us, that there were cast for subscription of stock by Knox county five hundred and ten votes (510 votes), and that there were cast against subscription of stock by Knox county ninety-eight votes (98 votes).

We certify the above to be a correct statement of the number of votes cast at said special election for and against the proposition for the county court of Knox county to subscribe $100,000 to the railroad. Given under our hands the date above written.

(Signed) JAMES C. AGNEW, *Clerk.*
JOEL SEEVER, *J. P.*
DAVID BUNNELL, *J. P.*"

To the reading of this entry respondent objected—

First. Because it was a copy and not the original certificate, and the absence of the original was not accounted for.

Second. Because there is no evidence that the county court itself passed upon the validity of said election.

Third. Because the clerk of the county court had no authority to copy said certificate into the records of the county court.
55 These objections were overruled and said entry was permitted to be read in evidence; to which ruling of the court the respondents at the time excepted.

Relator next showed by the records of said county court that between the 18th day of March and the 6th day of May, 1867, the said court was not in session, and further read in evidence an order of said court made on the 13th day of May, 1867, as follows:

Now at this day it is ordered by the court that the president justice of this court be, and is hereby, authorized to subscribe, for and in the name of the county of Knox, for the use of the inhabitants thereof,

one thousand shares of stock in the capital stock of the Missouri & Mississippi Railroad Company upon the following terms and limitations: 1st. That the sum of one-half of one per cent. of said stock, being one hundred thousand dollars, be paid in cash to defray expense of survey of said road through Knox county. 2d. That the remaining 99½ per cent. of said stock be issued in bonds of the county of Knox, bearing seven per cent. interest per annum, and running ten years, with coupons attached, the interest on said bonds payable annually at the treasury of the county of Knox aforesaid; said bonds to be signed by the president justice of said county court and attested by the clerk thereof, and made payable to said railroad company upon order of the president and directors thereof; but in no case shall bonds be issued except for work actually done on said railroad within the limits of said Knox county, which am't of work shall in all cases be shown by the estimates of the engineer of said road, verified by his affidavit, which said estimates shall be filed in the office of the clerk of this court.

56 Relator next read in evidence an order of said county court made on the 16th day of May, 1867, whereby said court levied a tax of 25 cents on each $100 worth of property in said county, to pay interest on bonds to be issued under said order of May 13th to the said Missouri and Mississippi Railroad Company. Relator also read in evidence orders made at the May terms of said county court in subsequent years, whereby tax liens were made to pay interest on bonds issued to said railroad company as follows:

In the year	1868,	30	cts. on each	$100.
" "	1869,	30	" "	
" "	1870,	30⅓	" "	
" "	1871,	50	" "	
" "	1872,	50	" "	
" "	1873,	25	" "	
" "	1874,	75	" "	
" "	1875,	5	" "	

Relator admitted that from 1875 down to the present time—that is, ever since the decision of the supreme court of Missouri in the case of the State *ex rel. vs.* Shortridge, 56 Mo., 126—the annual levy for this purpose has been 5 cts. on each $100.

57 WILLIAM F. PLUMER, sworn for the relator, testified as follows:

Direct examination by Mr. SKINKER:

I live in Van Buren county, Iowa, and have lived there thirteen years the last of this month. I went there in 1870; prior to that time I lived in Knox county, Missouri, and was a justice of the county court of that county part of the time that I lived there—from about 1864 to 1870. I was one of the judges of the county court when the subscription was made which has been referred to. The other judges were Sylvester Schultz and Thomas O. Wamsly; James

C. Agnew and John B. Pogue were clerks of the court. Mr. Schultz is here in the court-room and Mr. Wamsly is dead; Mr. Agnew, the clerk, is also dead; he died about 1868 or 1869. I have heard the order of May 13th, 1867, read.

Q. Do you remember the making of that order?

A. Yes, sir; I do not remember positively the date; I recollect the order.

Q. As one of the justices of the court you participated in it?

A. Yes, sir.

Q. How did this subscription of May 13th come to be made?

A. It was made, my recollection of it now is, under a vote of the citizens of that county at an election prior to that time.

Q. Do you recollect the date of that vote?

A. No, sir.

Q. Do you recollect how long prior to that time the vote had been taken?

A. The vote was taken in the spring, and that order was made afterwards, in the same spring, if I recollect right. I cannot recall the dates of that time, that long back.

By the COURT:

Q. How came you to make the order?

A. Well, from the election, for the vote had taken place and the order was made, from my recollection now of the circumstances, to carry out the vote that was had in the early part of the spring.

58 Q. Why did you submit to the vote of the people this question whether you should subscribe?

A. By petition and request of the citizens.

By Mr. SKINKER:

Q. Why did you not act upon your own responsibility in the matter?

A. We would not take the responsibility to issue bonds to any railroad without a vote from the people of the county—tax-payers—those who were interested.

Q. Now, you heard the record read here this morning showing the submission of the question to the people during that winter. When you say you would not take the responsibility of making the subscription without the vote do you mean to refer to those proceedings or what do you mean in that respect?

A. I do not know as I can state it in that question, hardly. There was a desire for a railroad in the county, and that desire was put in the shape of a petition presented to the county court, and the county court made the order for the election, and afterwards subscribed under that; that is my recollection of the matter.

Q. The subscription that you speak of as having been made, when did that occur?

A. I think it was about 1867 or 1868. I cannot give you the date.

Q. The record which was read this morning fixes it.

A. The record read this morning is my recollection of the orders entered at that time; thirteen years absence, since I have been out of the county. I have no dates to go by.

Q. Do you know whether bonds were actually issued under that order or not?

A. Yes, sir; there were bonds issued under those orders.

Q. Do you know who signed those bonds?

59 A. Yes, sir; those that were issued under those orders—that is, regular county court orders.

Q. Have you examined any of the bonds recently with a view of ascertaining which bonds were issued under that order?

A. I have examined some bonds here.

Q. Here is a bond, No. 87, marked "Filed March 15th, 1881. M. M. Price, clerk;" look at that bond and see who signed it and who issued it, and under what order it was issued (handing bond to witness).

A. I believe that is one of the bonds. The signature of mine is genuine, I believe. I cannot swear to anybody's signature.

Q. Now, that bond is dated the 1st day of February, 1868; have you any means of fixing the exact date when the bond was issued?

A. Only by the records in the office, I think.

Q. Here is another bond, No. 102, marked "Filed March 15th, 1881. M. M. Price, clerk;" what do you say about that, as to how that came to be issued and who issued it (handing bond to witness)?

A. That was issued the same as the other, so far as I can see, without comparison with the entry on the face.

Q. Do you know under what orders these bonds that are dated February 1st, 1868, were issued (handing 58 bonds to witness)?

A. The first order made, if I recollect right, issued 58 (?), or about that; then there was a second subscription of $30,000, and another subscription of $55,000; that was as far as my connection with the court went.

Q. Can you tell under which of those orders the bonds were issued?

A. Not by examining the bonds. I would have to refer to the bond-book that was or is in the county clerk's office in Knox county.

Q. If you would see the bond-book could you identify it?

A. I do not know. I believe that that is the book (refer-

60 ring to a book shown witness); the clerk of the county court will say for certain.

Q. I will ask you if you or either of your brother judges was a lawyer, or if the clerk of the court was a lawyer?

A. Neither of us was a lawyer. All three were farmers. The clerk of the court had been clerk of different courts before, but was not a lawyer.

Q. You have seen the bonds, and have noted the recital contained in them?

A. Yes, sir.

Q. I will ask you if you know how that recital came to be put in those bonds?

A. I do not. I never saw the bonds or the form until after they were lithographed in St. Louis.

Q. Did you have anything to do with ordering the form in which they should be drawn up?

A. We left it to the clerk of the court, Judge Agnew, to attend to getting up the bonds. As to the form of the bonds, I do not know where he got that.

Q. You signed all those bonds. When you came to sign up those bonds was your attention specially called to that recital?

A. Nothing more than the examination of it myself.

Q. Going back to the subject that was first spoken about, you say you were unwilling to take the responsibility of making the subscription without taking the sense of the people?

A. That is what I recollect now.

Q. As to the subscription made on the 13th of May, 1867, what have you to say about that?

A. My recollection is that we were acting under the vote of the county in making that order.

Q. Was it your intention, in making that subscription, to carry out the vote or to act upon your own responsibility in the matter?

Defendant's counsel objects to the question.

61 The COURT: Perhaps you can get at it more closely, if the gentleman remembers so far back, that there were two acts they might have acted under, and whether, having made that recital, they meant it, or made a mistake.

By Mr. SKINKER:

Q. I will ask you if you considered the matter of taxation at that time?

A. My recollection is that we made the subscription under the vote, and supposed it to be under the general law, and proceeded to make a levy to pay the interest and assist in paying off the bonds. That is my recollection now of the first $100,000.

Q. Then, when this bond came to be signed up, if there is anything in the bond to the contrary, I will ask you whether it was or was not put in there by mistake?

A. I stated that I never saw that form until the blanks were in the court-house, in the office, and our county attorney was satisfied with them. We were not lawyers, and we signed those bonds supposing them to be correct—that they were "all right," in common parlance.

Q. Now, if there is anything in that bond that means that you did not proceed under that vote that was taken on the 12th of March, I ask you whether it was properly put in there or not?

Defendant's counsel objects to the question.

By the COURT:

Q. How came it to be put in there?

A. That was the form of bond that was gotten up for the purpose

of issuing the bonds on in that shape, and we supposed that the bonds were right, not being lawyers. Our attorney was satisfied with the bond, and we didn't know there was any mistake in there, or whether there is or not.

By Mr. SKINKER:

Q. Was it your purpose to put into the bond anything that would imply that you were not proceeding under the vote of the people?

62 A. I believe not. According to my recollection, the intention was that those bonds should conform with the vote—that is, we intended to carry out the vote of the people in issuing the bonds, acting as servants for the people, for the county.

Q. And if anything was put in there by the man who drew that bond up to the contrary of that, I ask you if you signed that bond knowingly—knowing there was something in there to the contrary?

A. Not that I recollect of now.

Q. I will ask you if the recital here about the act incorporating the Missouri and Mississippi River Railway Company was discussed at that time in your court among your officers?

A. Not that I recollect of, in court.

Q. Was anything else said about it elsewhere?

A. The county attorney and the clerk of the court and myself discussed a little about it in regard to the amount of tax that was levied in the act.

Q. What passed on that subject?

A. The tax was so small that the bonds would be worthless, and the attorney thought we had a right to go on under the regular statute the same as we had been going on in the way of levying taxes to pay the interest.

Q. You say that the tax would be so small; what tax do you refer to?

A. To the clause in the charter of the company of one-twentieth of one per cent.

Q. How much would that tax have yielded in Knox county?

A. I cannot say now.

Q. Can you say approximately?

A. No, sir.

Q. Do you know about what the valuation of the property was there?

A. I have forgotten now.

Q. The conclusion was that the tax was so small the bonds would be worthless?

A. That they would not sell in the market.

63 Q. If you issued them under that charter?

Mr. REYNOLDS: That is not what he said at all.

By Mr. SKINKER:

Q. What idea did you mean to convey?

A. We had commenced under the general statute with a vote, and

in the discussing about the levy of the taxes—this discussion I have reference to was between the county attorney and the clerk, who is now dead, outside of the court.

Q. What was the discussion?

A. As near as I can recollect, the attorney said we had a right to go on and levy sufficient to pay the interest under the general law and ignore the twentieth of one per cent.

Q. Altogether?

A. In making our levy; and we proceeded in that way afterwards. I do not recollect who was present; there were one or two; we were sitting in the clerk's office at the time.

Q. Was it understood at the time that there was anything in this bond to indicate that you did not proceed in issuing it under the general law and in pursuance of that vote?

Defendant's counsel objects to the question.

By the COURT:

Q. How came you to issue that bond in that form?

A. This bond was lithographed and fetched into the office of the county clerk and the county attorney, that we depended on for the form, presented that to us; I was not, and my associates were not, lawyers, and we accepted that form.

By Mr. SKINKER:

Q. That was under the seal of your court?

A. Yes, sir.

Q. There is a recital that you proceeded under the special act and the charter of the road; how came you to put that in there?

64 A. That is not worded exactly as I thought it was; I though that this should have been that the bond was issued to the railroad company authorized by a certain act, but we were acting under a general law, under a vote, under a general law to raise this money for these bonds, to issue them and raise the money to pay the interest on them.

Q. "This bond being issued under and pursuant to the order of the county court of Knox county for subscription to the stock of the Missouri and Mississippi Railroad Company as authorized by an act of the General Assembly of the State of Missouri entitled," &c. What do you mean to say "as authorized," and so on, refers to here?

Defendant's counsel objects to the question as incompetent. Objection sustained.

Q. I will ask you again how did that clause come to be in this bond?

A. I don't know; I never saw the bond or forms until they were lithographed.

Q. You had nothing to do with putting it in?

A. No, sir; not in making up the form of the bonds.

Q. Does the bond indicate on its face where it was lithographed?

A. In St. Louis.
Q. By whom?
A. Gast, Miller & Co.
Q. Then for all you know that bond was drawn up by Gast, Miller & Co.?
A. I do not know where the form came from.
Q. Did you at all consider the subject of the form in which the bond ought to be drawn?
A. No, sir; that was more than we were lawyers for.
Q. You left that matter to Mr. Agnew, the clerk?
A. That is my recollection; it was left with him to proceed to St. Louis and have the bonds lithographed. Afterwards there was some change made in the bonds, and the other parties furnished the bonds.

65 Q. Was it the purpose of the court to indicate by the bond that they were not proceeding in pursuance of this vote?

Defendant's counsel objects to the question.

By the COURT: You signed the bond as it was?
A. Yes, sir.
Q. Did you notice the recitals in the bond?
A. Yes, sir.
Q. You signed it knowing the recitals were there?
A. Yes, sir.

By Mr. SKINKER:

Q. Did you consider its meaning at the time?

Defendant's counsel objects to the question. Objection sustained.

Q. Was the recital in here a mistake or not?
A. I do not know as I can hardly answer that.

By the COURT:

Q. Had you in your mind the two acts of the Legislature, one under which you could only assess one-twentieth of one per cent. and the other under which you could assess taxes without limit?
A. My impression is just in this way, that we were acting under the general law under the vote, and the railroad company was authorized under a special statute, and if there was a mistake or ambiguity in the bond our attorney failed to see it and show it to us, and we were not lawyers enough to detect it ourselves.
Q. You were aware of the existence of the two statutes?
A. Yes, sir.
Q. And you were aware that you had the right to subscribe without any vote?
A. Yes, sir.
Q. If you did subscribe independently of the vote of the people the taxation would be limited to the twentieth of one per cent. You were aware of that at the time?
A. Yes, sir.

Q. You took the vote of the people, and when you came to
66 subscribe, if you subscribed, then the people would be subject to tax beyond the limit of one-twentieth of one per cent.?

A. It was under the general statute that I supposed we were acting at the time—that is, for the first $100,000.

By Mr. SKINKER:

Q. You knew if you proceeded under the general statute that you could levy a tax sufficient to pay the whole of it?

A. We supposed we could.

Q. Had you read the law in the statute books?

A. We had our attorney's opinion and proceeded under his advice.

Q. And, on the other hand, did you or not understand if you proceeded under the charter you were limited in the power of taxation?

By Mr. REYNOLDS:

Q. Did you understand you were limited at the time you made the subscription?

A. The second subscription?

Q. The first subscription.

A. We did not make the first subscription under the charter act.

Q. Did you understand at the time of the first subscription that you were limited to one-twentieth of one per cent. if you proceeded under the charter?

A. We knew what the charter said.

Q. That is not my question. Did you know that you were limited to a tax of one-twentieth of one per cent. if you made the subscription under the charter when you made the first subscription?

A. Yes, sir; we knew what was in the charter.

By Mr. SKINKER:

Q. At the time the transactions took place, was there any other railroad in the county?

A. No, sir.

Q. Was there any other company proposing to build a road in the county?

A. There was some talk of building a road from West Quincy. I do not recollect that there was any organization to build the road.

67 Q. Was there at that time talk about building the M. & M. road, at the time of the first subscription?

A. Yes, sir; it was known the charter was in force; it was not known at which point the railroad would come from; the vote was taken to induce some railroad to build through the county.

Q. Was it known that the company was organizing for the purpose of building through the county?

A. I don't recollect that it was known at the time the election was held.

Q. You have spoken of one of those bonds; you have examined them all, I believe?

A. I did, a few days ago, the bonds filed in the office.

Q. I understand you to mean that what you say applies to all of them?

A. What I examined, I think, were genuine. I cannot swear positively to my handwriting or anybody else's, being a farmer and going back and forward to court.

Defendant's counsel admits that there is no question as to the genuineness of the bonds.

Cross-examination by Mr. REYNOLDS:

I live in Van Buren county, Iowa, and have lived there since the fall of 1870. I was county judge of Knox county from some time in 1864 until October, 1870. I was elected, I think, 1874, and in 1866 was throwed out by ordinance. I believe I was sworn in three times altogether; the records will show whether I was holding under an election in 1866. I was elected, as near as I can recollect, about 1864 and 1866. My commission here will show when I was elected. I believe I was elected in 1866 for a term of six years. When I left Know county my term of office had not expired and I resigned because I had traded farms with a man in Iowa. I believe I had disposed of all my property in Knox county then. I was not compelled to leave Knox county.

68 Q. Were you not threatened?

A. No, sir; not personally that I ever know of.

Q. Were you not threatened on account of this very subscription that you made, and didn't you leave in consequence of it?

A. No, sir; not at all.

Q. There was a great deal of excitement among the people after they found the court had made this subscription?

A. There was a great deal of talk but not excitement.

Q. Do you remember of an order made while you were there for $100,000 of boads and then for $30,000 and then for $55,000?

A. I believe that is the order they were made in.

Q. Were those all the orders made for bonds while you were in the county and a member of the county court?

A. No, sir; I believe not. I believe there was an order made for bonds for the construction of the road from Edina northeast, but they were not issued while I was in office that I recollect of. My recollection now is that it was $100,000 for that purpose.

Q. Was not that order of $100,000 of bonds made to the same road?

A. The M. & M.?

Q. Yes.

A. I believe it was.

Q. Was not that the second order that was made?

A. That I could not tell you now; my recollection is that they were in the order you said a bit ago.

Q. You recollect the fact that there was a second order for the subscription of $100,000 of bonds for the M. & M.?

A. For the northeast end of it.

Q. Did you have a vote of the people on that?

A. No, sir.

Q. How long after the first order was the second subscription of $100,000 made?

A. I can't tell you now; I think the records show that.

69 Q. Was the charter of this road discussed or brought to the notice of the county court when it was first suggested to take a vote of the people?

A. I can't remember.

Q. Don't you know that it was?

A. No, sir; I don't know positively that it was.

Q. When you came to make the order for the subscription of May 13, 1867, was not the charter of the M. & M. road discussed?

A. It might have been; I can't say positively.

Q. Will you say it was not?

A. No, sir; I will not say either way positively.

Q. Who was the circuit judge of your circuit at that time?

A. I cannot tell you positively whether it was Judge Wilson or not. I do not know that it was Judge Wilson or not. I do not know that it was Judge Wilson. I know Judge Wilson and see him sitting here now.

Q. Didn't you have frequent conversations, as member of the county court, with Judge Wilson, your circuit judge, before the subscription was made by the county court in regard to it?

A. I cannot state now.

Q. Will you say that you did not?

A. I have talked with him and other citizens in regard to railroad matters. It was general talk.

Q. Do you not remember that at the time the subscription order was made on May 13th there was quite an assembly of leading citizens present in the county court in regard to that matter?

A. I cannot state positively how many there were; there were some.

Q. Was not the matter discussed as to the advisability of making the subscription?

A. I cannot tell you what the discussion was.

70 Q. Was it discussed?

A. It might have been, but I will not say positively.

Q. Do you undertake to say that you put your county $100,000 in debt without any discussion?

A. No, sir; I do not. I do not recollect what the discussion was.

Q. I ask you whether there was not a big discussion about the matter on the day of the subscription before the county court?

A. It was discussed, but I cannot tell you the individuals.

Q. Was not the charter of that company distinctly before you? Didn't you know what the charter was?

A. Yes, sir; we knew what the charter was.

Q. Was not General Jones, from Macon City, there representing the railroad company?

A. I don't recollect.

Q. Wasn't Col. Gilstrap there representing the railroad company?

A. He was at different times, but I don't know whether he was there that particular day.

Q. Was it not in pursuance of an understanding between your county court and the representatives of the railroad company that the form of bond adopted was adopted?

A. I don't recollect about the form of the bond.

Q. Did not the representative of the railroad company present, Col. Gilstrap, draw up the form of bond adopted by the county court for its approval?

A. As I said before, I never saw that form that I recollect of now until after it was lithographed.

Q. Do you undertake to say that the form of that draft was not submitted to the county court, or the representative of the county court, its attorney, before it was lithographed?

A. I don't recollect.

Q. Do you say it was not?

A. I say I don't recollect that it was.

71 Q. Don't you know that there was a form of bond brought up there that was lithographed, that was submitted to the court by the representative of the railroad company, and which was not accepted, and sent back to be corrected before the present bonds were signed and issued?

A. I don't recollect distinctly about it.

Q. Don't you remember the fact that those bonds that were submitted, that the first draft of the bond was lithographed and submitted to the county court by the railroad which had obtained the subscription, the M. & M. road, was not accepted to all parties, and the bonds you did sign were the result of negotiations between the railroad company and the county court?

A. The first bonds were payable at the treasury and the second were payable at the Bank of Commerce, in New York; those two forms are all I recollect of seeing.

Q. Payable at what treasury?

A. At the treasury of the county, or payable at the county-seat; it is my recollection that the first bonds were payable at the treasury of the county.

Q. And that was the lithographed form?

A. It was in that form. I think it is what they call lithographed.

Q. It was printed after that still?

A. Yes, sir.

Q. Instead of reading to be paid at the National Bank of Commerce, in New York, it read to be payable at the office of the county treasurer, Edina, Knox county?

A. That is my recollection.

Q. That was submitted to the court?

A. The company requested a change be made to the Bank of Commerce for convenience.

Q. Was not that the only change made or suggested to be made in these bonds?

A. I don't recollect of any other.

Q. Then, didn't you accept the bonds as the county court, at the representations of the railroad and railroad officers, with
72 this change, changing them to the Bank of Commerce, in New York?

A. We accepted them as our attorney said.

Q. Did you not accept them as a county court?

A. We did; under his advice.

Q. Didn't you, as a county court, on the representation of the railroad attorneys, and railroad representatives that that was all the change that was desired, accept the form of bonds they gave you and make that change?

A. Just as I stated before.

Q. You do know that the attorneys of the railroad company and the president of the railroad company were the ones that submitted the bond to you?

A. Some of the bonds, if I recollect right.

Q. The first $50,000 of bonds that was issued out of the $100,000 subscription?

A. I forget the amount of the first lot.

Q. Did not the form that you adopted come to you from the railroad officers or attorney?

A. I don't recollect where the form came from.

Q. Was it not presented to you by them?

A. Not that I recollect; Judge Agnew fetched the bonds into the office.

Q. Which bonds?

A. The first issue of bonds lithographed here for us to issue. I suppose he fetched them from St. Louis; that is where he told us he got them.

Q. Is that all he told you?

A. I don't know what he told us.

Q. Who told you that the railroad was not satisfied with the treasury of Knox county being there instead of the Bank of Commerce?

A. I don't recollect who told that now. It was discussed and thought advisable to make the change.

Q. At whose solicitation?

A. The railroad directors, if I recollect right.

Q. Was it not the railroad directors and the railroad
73 attorney and your court altogether that agreed on that form of bond before it was printed finally?

A. Not that I recollect.

Q. When the bond was agreed on and the treasury of Knox county stricken out and the Bank of Commerce put in as the place of payment, was not that agreed on by the county court and the railroad representatives as the proper bond?

A. I don't know about the railroad representatives; we agreed to

it. I believe that we were told that if we made the change it would be acceptable to the railroad.

Q. Didn't you say that the railroad company wanted the change made?

A. Probably they did.

Q. Didn't you say they did?

A. I think so.

Q. Don't you know what you said here awhile ago?

A. It was through their representation—their request.

Q. It was at their request the change was made?

A. Yes, sir; that is my recollection.

Q. Then, it was agreed between you and them that the bond would be acceptable?

A. That is my recollection.

Q. Up to that time had you any discussion in your court as to the necessity of a vote of the people as a prerequisite to the issue of the bonds before the subscription?

A. It had been talked of—talked of all over the county and in court.

Q. When the question came up about the subscription to the particular railroad, as to whether under their charter a vote was requisite?

A. I cannot state directly.

Q. Do you undertake to say that it was not distinctly discussed before you and distinctly claimed by advocates of the bonds at that time that the county court had power to issue bonds to that road without a vote of the people?

Plaintiff's counsel objects to the question as immaterial and irrelevant. Objection overruled.

74 A. There was a discussion in regard to it that we could under the railroad charter issue without a vote of the people.

Q. And that discussion took place before the bonds were issued?

A. Not that I recollect now.

Q. It all took place after the bonds were issued?

A. After we commenced.

Q. After the first $100,000 were subscribed?

A. As I recollect.

Q. The first you heard that there was a clause in the charter of the M. & M. road that allowed you to subscribe bonds without a vote of the people came to you after the vote and after the first bonds were issued; is that what you say?

Plaintiff's counsel objects to the question as immaterial and irrelevant. Objection overruled.

A. I can't recollect how, in order, those things happened. If I would be allowed a little personal explanation I would state that I had removed from the county and been in another county, and those dates and the order in which they come I can't distinctly recollect. I have a very poor memory to run against a record, and I only wish

to state what was my understanding at that time—that is, as far as I can recollect.

Q. You do not know what time you had that understanding?

A. I don't recollect distinctly the times and courts that the things happened—the dates, and individuals that were at court.

Q. All you have been testifying about, conversations and understandings that you have had, might have occurred after the issuing of the bonds, for anything you remember?

A. I remember a few of the general things that happened at the time, and that is all.

Q. You testified to a discussion between yourself and the
75 county clerk, Judge Agnew, and the county attorney as to the rate of taxation on the respective bonds.

A. We had a conversation.

Q. Will you undertake to say when the conversation occurred with respect to the issue and signing of the first $100,000 of bonds?

A. I can't locate the time.

Q. It may have occurred long after that?

A. It probably occurred——

Q. Not probabilities; I want your recollection.

A. This matter ran three or four years, and it is a confused mass with me. With a week or two in the clerk's office with the records I could probably give it a good deal more accurately.

Q. The first tax you levied to pay the interest on the bonds was levied on the 16th day of May, 1867, which was three days after the vote for the issue of the bonds took place. Might not the conversation have occurred with reference to the levy of the tax?

A. I think not; I think it was afterwards.

Q. You knew at the time you had the conversation that the bonds recited they were issued under the M. & M. charter?

A. I can give you no definite dates positive.

Q. Did you know at the time you had the conversation which you are talking about that these bonds had been issued under the M. & M. charter?

A. Not that I recollect of now.

Q. Had the bonds been issued then?

A. That I could not state distinctly.

Q. Was not the substance of the conversation between you and the county attorney that, notwithstanding the recital that the bonds were issued under the M. & M. charter, you had a right to levy for all the interest on all the taxable property?

A. My recollection is that the conversation happened when they found that $100,000 would not grade and tie and bridge that
76 line—some time before it was necessary to make an additional subscription.

Q. That was long after the first subscription had been issued and in part exhausted?

A. It must have been.

Q. How could you tell it was not enough to finish the grading and tieing?

A. That is my recollection now. It must have been.

Q. This conversation, I understand you, about the difference in rate of taxation under the two charters or two laws occurred long after the bonds or some time after it?

A. I think it was.

Q. Will you please distinctly state to me whether it was not distinctly argued that although the charter of the M. & M. railroad authorized you to make the subscription without the vote of the people, yet, as public officer, it was better for you to take the sense of the people before you acted on it? Did not Judge Wilson make that argument to you?

A. I don't recollect now.

Q. Will you say it was not made?

A. I will not say it was not made; I say I do not recollect it.

Q. Will you undertake to say that the vote was not taken for the information and backing up of the court to enable them to act under the M. & M. charter?

A. Not that I recollect of.

Q. Will you say that was not the case?

A. I have no recollection of that point.

Q. And that was not presented to the county court?

A. What?

Q. That view of the case—that, although you were authorized to issue the bonds without a vote of the people, yet as a matter of policy you had better take a vote on it?

A. I am sorry that I cannot answer you positively.

77 Q. I am very sorry.

A. I would be glad to do so if I could.

Q. Will you say that was not the case?

A. I have not the recollection to answer either way.

Q. You will not say it was or was not?

A. I will not say it was or was not.

Q. You have talked a good deal with Mr. Skinker about the case since you have been here?

A. I have talked some with him and a little with Judge Carr.

Q. Did Judge Carr help your recollection any?

A. Nothing in particular.

Q. Did Mr. Skinker help it much?

A. Nothing in particular. I have examined the records all I could to refresh my memory as far as I could.

Q. Then, as an independent recollection on your part, have you any recollection of the transaction but a very vague one?

A. A rather vague recollection of the transaction.

Q. Have you any other than a vague recollection of the power that the county court was acting under at the time you made the subscription?

A. I cannot say that I have a perfect, distinct recollection.

Q. You have gone over all the books since you came here?

A. No, sir; only certain orders.

Q. Did you go over book 3?

A. I did not notice the number; it was a book that Mr. Ennis brought down as the records of the court.

Q. Where did you find it?
A. In Mr. Skinker's office.
Q. I see on page 302 that your name, Plumer, is signed there?
A. Yes, sir.
Q. When did you sign it?
A. As soon as the record was made up after the court adjourned.
78 Q. On this page?
A. I think that is my signature.
Q. Do you undertake to say that you put your signature there at that time?
A. I say that some time after the adjournment of the court, if I recollect right.
Q. Didn't you put your signature to the record in this city?
A. No, sir; not at all.
Q. You have not signed up any records since you have been here?
A. No, sir.
Q. You are sure of that?
A. Yes, sir; I am positively sure of that.
Q. This signature there has been there all the time?
A. So far as I know.
Q. I understand that you signed all of the $100,000 of the first issue?
A. I must sign when I was justice.
Q. Did you read the bond over before you signed it?
A. We examined them and signed them on the estimates of the engineer only.
Q. You signed them on what?
A. On sworn statements of the engineer under an order of the court.
Q. You examined them and knew what was in them when you signed them?
A. I read them over, but, as I have said before, I was not lawyer enough to know whether it was in exactly in the right form or not; I depended on the attorney for that.
Q. You relied on the attorney as to the recitals being in there correctly?
A. Yes, sir.
Q. If it was the way he wanted it signed you signed it that way?
A. Yes; in part. I felt satisfied reasonably well with the form of the bond. Forms are something we were not very well calculated to get up.
Q. Do you undertake to say positively, in view of the whole matter, that you distinctly recollect that the county court
79 did not issue those bonds under the charter of the M. & M. road?
A. We did not suppose that we were doing that, if my recollection serves me right—that is, the first $100,000,
Q. That is what I am talking about. What do you mean about your recollection serving you right?

A. If I recollect distinctly.

Q. Do you recollect distinctly?

A. I do not recollect distinctly, only that we were trying to act under the vote voting $100,000 assistance to the road.

Q. You do not recollect whether you were acting under the vote or under the M. & M. charter?

A. We tried to act under the vote to satisfy the vote of the people of the county; that is my recollection now.

Q. Do you mean to say that you did not have in mind the power you had, and were not acting under the power you had by virtue of the M. & M. charter?

A. I do not know as I understand you.

Q. Were you acting independently of any provision in the M. & M. charter in issuing the first $100,000 of bonds?

A. We were issuing them to the M. & M. under the vote of the people.

Q. Were you issuing them under the charter?

A. Not that I recollect of; we were issuing them under the vote.

By the COURT:

Q. Did you mean to do what you did when you signed the bond?

A. I supposed when I signed the bond that I was signing it to carry out the wishes of the people of the county.

Q. Did you know what you were doing when you signed the paper?

A. Yes, sir; we supposed we did; we didn't know whether we did, like all other farmers in legal matters:

By Mr. REYNOLDS:

Q. Did you read the matter over in the book you have there, on page 302, or was it read over to you before you signed it?

80 A. I can tell you when I look at it whether I read it before or not (referring to the book).

Q. Have you read the record on page 302, the order making the subscription for $100,000?

A. Yes, sir.

Q. Didn't you read it over carefully at the time?

A. It was read over in open court and consented to and signed.

Q. You deliberately signed it?

A. Yes, sir; I signed it; I am very certain that is my signature.

Q. You are certain that you know what was in the order exactly when you signed the record?

A. Yes, sir.

Q. You knew the contents and understood it?

A. In a general way.

Q. How does it happen, if you were acting wholly by virtue of the vote of the people, that you did not say something in the order about that you were acting under the vote of the people?

A. The clerk was an old clerk, who had been clerk for years, and been a county judge himself, and we depended on him to make the

record himself. We relied on him, and we never saw there was anything in there until the question came up here.

Q. Can you turn to the order made for the second $100,000?

A. No; I don't know the page of the order.

Q. You understand plain English, don't you?

A. I would like to understand it.

Q. Don't you?

A. Tolerably.

Q. Didn't you understand exactly what the order said?

A. We thought it was sufficient.

Q. Don't you know that there was no reference to a vote of the people?

A. I know it now.

Q. Didn't you know it before?

A. I know now there was no reference to the vote of the people.

Q. Did the clerk read it in open court?

A. Yes, sir; I think he did.

81 Q. Didn't you understand it?

A. We thought it sufficient.

Q. Didn't you understand it?

A. I understood that order, that it would answer the purpose.

Q. Didn't you know that that order under which the bonds were issued of May 13th, 1867, had no reference whatever to the vote of the people having been taken?

A. I could not tell you the wording of the order now, only just what I have read, and I see it does not refer to the vote of the people.

Q. Didn't you know it all the time?

A. I didn't know it till I read it over; I didn't recollect it since that time.

Q. Didn't you know at that time that it had no reference to the vote of the people?

A. I didn't recollect it till I saw it.

Q. Didn't you know at that time that it had no reference to the vote of the people?

A. I didn't think it was necessary.

Q. Did you misunderstand it?

A. I thought it was right the way the clerk wrote it.

Q. Didn't you know how the order was written the time you made the second subscription and every subscription as county justice—that they were all entered the same way?

A. Not quite the same way; the clerk used the same form.

Q. And there was no reference to the vote of the people in any of them, was there?

A. I think not in any that I have looked over since I have been here.

Q. And no reference to the charter of the railroad in any of them?

A. No; I think not.

Q. Just the same form as this, with some change as to terms?

A. We looked to the terms and all that we thought was necessary.

Q. You knew there was nothing in there but what was there?

A. We put in what we thought was necessary, but it appears we did not put enough in.

82 Q. There was no misunderstanding about the order at the time?

A. Not that I recollect about it.

Q. You were not confused about it?

A. Not that I recollect; the clerk wrote it that way, and being farmers we were rather neglectful about having it written in full.

Q. You thought the same thing when you signed the bonds?

A. We acted on our legal advice.

Q. Without any particular reference to anything but that was the way it was to be done?

A. We looked it over and done the best we could according to the best of my best knowledge, which was not great.

Q. Nobody concealed anything from you?

A. Not that I know of.

Q. You were an active partisan in favor of the railroad?

A. I was in favor of the railroad.

Q. You were active and were in favor of the subscription being made?

A. I was a railroad man, as it was called.

Q. Were you not one of the directors of the railroad company?

A. I was named as director in the charter, but never served in the company. When a meeting of the board was held at the court-house, in Edina, I asked to be relieved, because I was a member of the county court and did not wish to act in the board in issuing bonds for the county to a railroad company that I was a director in.

Q. Were you relieved?

A. Yes, sir.

Q. Did you never serve with them any more?

A. Only as agent of the county when the court sent me to Macon City or to meet the board as agent when there was an election of directors. Sometimes I went and sometimes others went.

Q. Who sent you?

A. Knox county court.

83 Redirect examination by Mr. SKINKER:

Q. When you were sent down to Macon to vote the stock at the stockholders' meeting?

A. Yes, sir; sometimes Judge Wamsly went and sometimes myself.

Q. You never acted as director?

A. No, sir.

Q. And never had any stock in the company?

A. No, sir; no interest, only to get the road built through the county for the good of the county.

Q. You were asked whether there was not some excitement in the county about the subscription; was there any excitement in regard to the first $100,000?

A. None that I recollect of now.

Q. You have been asked as to the form of the bonds, and you

have stated, as I understand, that the form was changed this far: that instead of being made payable at the county treasury, they were made payable at the Bank of Commerce, in New York?

A. Yes, sir; that is my recollection.

Q. I will ask you if any other part of the bonds was discussed at that time, according to your recollection, except the place of payment?

A. That is all I recollect of at present that I can think of now.

Q. In issuing the bonds, to what parts of the bonds did you pay attention; did you consider anything further than the amount the bond called for and the rate of interest and the time of payment of the bonds?

A. I paid attention to them, as nigh as I can recollect, as to the issuing of a note individually.

Q. You were particular as to the amount of the bonds as of a note and the rate of interest and the time of payment?

A. Yes, sir; we were anxious to do the best we could for the benefit of the county.

84 Q. And further than that you did not pay special attention?

A. As to the special form, I was not lawyer enough to understand whether it was exactly right or not.

Q. You have also been asked about the form of the order here. Were you advised that it was necessary in drawing up the order to say something about the power of law under which you were proceeding? Did you have any advice on that point?

A. I do not recollect now what the discussion or advice was; as I said before, we were depending on the clerk, that we considered almost infallible, and that is where the difficulty came in.

Q. In respect to the orders of the court generally, who drew them up?

A. The clerk.

Q. Did the judges of the court ever undertake to draw them up?

A. No, sir; no more than to tell the clerk what we wished.

Q. The substance of what you wished in the order?

A. Yes, sir.

By Mr. REYNOLDS:

Q. I understand you to say that Col. Agnew drew all the orders and submitted them to the court or read them to the court?

A. He wrote up the record—that is, the clerk wrote up the record.

Q. Whom do you mean by the clerk?

A. The clerk of the county court.

Q. What was his name?

A. Agnew.

Q. Do you undertake to say that all orders were drawn up by Mr. Agnew—the order of May 13th, 1867?

A. The acting clerk at the time drew up the orders.

Q. This particular order of the 13th of May, 1867; did Mr. Agnew draw it up?

A. I think he did.

Q. I want you to be positive.
A. I won't be positive.
Q. You know his writing, don't you?
A. In a general way, I do. That looks very much like his handwriting.

85 Q. Do you undertake to say that he prepared the order—the draft of it?

A. So far as I know.
Q. Because you relied on him as being the proper man to draw it, and then you adopted it as the action of the court?
A. Yes, sir; we relied on him to write up the order.
Q. There is the original order itself (handing paper to witness); whose handwriting is that?
A. I am not an expert in handwriting. I might make a little explanation in this way: that, like all other boards, we sat down around a table and the clerk kept a journal and afterwards made the record.
Q. I understand you to say that the reason you signed it was the confidence you had in Judge Agnew?
A. He read it, and I thought it was right.
Q. I thought that you said you relied on him?
A. I thought it was right and I signed it.
Q. Do you undertake to say that is Judge Agnew's writing (referring to the paper previously shown witness)?
A. No, sir; I do not think that is.
Q. Is that the original of that order?
A. It may be; I do not know that paper.

Relator next called Abner L. Gilstrap, who, being duly sworn, testified that on and prior to the 13th day of May, 1867, he was president of the Missouri and Mississippi R. R. Co.; that at that time said company was contemplating and endeavoring to secure the construction of a line of railroad from Macon City, in Macon county, Missouri, through Edina, in Knox county, to Alexandria, in Clark county.

86 Witness then produced and identified the journal of the proceedings of the board of directors of said company, and read from said journal a resolution of said board adopted at a meeting held on the 13th day of May, 1867, at the said town of Edina, accepting the subscription to the capital stock of said company that day made by said county court; and also read a resolution of said board appointing himself and two others a committee to draw up forms of certificates of stock and other instruments to be used by said company, including bonds to be issued by counties to the said company.

Witness testified that, in compliance with said resolution, he drew up a form for such bonds; that in the county of Macon, where he himself resided, a subscription payable in bonds had already been made by the county court of said county without taking a vote of the people; that he drew up a form applicable to that case; that he sent this form to all the counties which were subscribing to his company, including Knox, and that the bonds before the court in this case are in the form drawn by him.

A bond of the county of Macon being produced in evidence was found to be *mutatis mutandis* the same form as those of Knox. They both bore the stamp of the same lithographers, "A. Gast & Co., St. Louis," and the position of the words and other marks on the bonds indicated that they were both printed on the same stone. Witness was of opinion at the time this subscription was made that the county court had power to subscribe under the charter without a vote of the people.

Relator also produced evidence showing that the fifty-eight bonds described in the first paragraph of his petition were issued in pursuance of the order of subscription of March 13th, 1867, at
87 various times during the year 1868. It was admitted that the sixty bonds described in the second paragraph of said petition were issued under an order of said county court made on the second day of May, 1870.

Relator also offered evidence showing that the taxes levied by the county court, as above set forth, were paid by the tax-payers of said county as fully and punctually as other taxes, and that the proceeds of said taxes were applied from time to time to the payment of coupons for interest maturing on all said bonds as the same matured, and that all such coupons were paid up to and including the year 1874.

It was admitted that the decision of the supreme court of Missouri in the case of the State of Missouri *ex rel.* The Missouri & Mississippi R. R. Co. *vs.* The County Court of Macon County, reported in vol. 41 Mo. Rep'ts, p. 453, was promulgated October 25th, 1867.

Relator then rested.

Thereupon the court instructed the jury as follows:

GENTLEMEN OF THE JURY: The issues of fact submitted to you are—

First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the county court to the stock mentioned in said orders? Whether or not the required number of voters cast their votes at said election, if held, is conclusively established by the records of the county, behind which no inquiry of fact is permissible.

Second. Was the subscription to stock in the R. R. Co. actually made, not as recited in said bonds, under the charter of the M. & M. R. R. Co., but under the general law, whereby the authority
88 to make said subscription and issue bonds therefor was dependent on the vote of the people. In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence.

The jury are instructed that to overcome the recitals in the bonds issued by the county court under its seal that the evidence must be clear and positive, full and explicit, and that the burthen of proving the alleged mistake so as to overthrow said recitals is upon the relator in this case.

And the court further instructs the jury that the evidence to overcome said recitals is insufficient.

The jurors will answer said inquires affirmatively or negatively—that is, Yes or No—to each of said inquiries.

Under the instructions thus given the jury should answer the first inquiry, Yes; and the second inquiry, No.

To the giving of these instructions the relator, at the time, objected and excepted.

In obedience to these instructions the jury returned the following verdict:

U. S. *ex rel.* HARSHMAN *vs.* COUNTY COURT OF KNOX COUNTY.

As to the issue submitted by the court we, the jury, find as follows:

On the 1st issue: Yes.
On the 2nd issue: No.

ANTHONY ITTNER, *Foreman.*

89 And afterwards, to wit, on the 1st day of November, 1883, the following judgment was entered in said cause, to wit:

THE UNITED STATES at the relation of GEORGE W. HARSHMAN,

vs.

THE COUNTY COURT OF KNOX COUNTY, MISSOURI.

Now again come the parties, by their respective attorneys, in the above-entitled cause—

And the court having duly considered the petition for the alternative writ of mandamus in this cause and the writ issued thereon, under and by which the defendants were required to levy forthwith a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause said tax to be collected in money, and when collected to be applied in payment and discharge of the judgment described in the said petition & writ, or that it show cause why it refuses so to do, and the return of the defendant in said cause to said writ, as well as the answer to said return and the reply of the defendant thereto; and the court having heretofore framed issues and submitted the same to a jury as follows:

First. Was there an election held under the orders of the county court read in evidence and did two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the county court to the stock mentioned in said orders?

Second. Was the subscription to stock in the R. R. Co. actually made, not, as recited in said bonds, under the charter of the
90 M. & M. R. R. Co., but under the general law whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people?

And the jury, having heard the evidence submitted on said issues, *and* returned into court the following verdict:

"As to the issues submitted by the court we, the jury, find as follows:

On the first issue: Yes.

On the second issue: No.

ANTHONY ITTNER, *Foreman.*"

And the court having heard and duly considered the pleadings and all the issues as well as the evidence in the case and the verdict of the jury as aforesaid and the arguments of counsel, and being now fully advised in the premises, and forasmuch as it appears to the court here by the verdict of the jury aforesaid, as well as by the evidence in the case heard by the court, that there was an election held under orders of the county court of Knox county, and that two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the said court to the stock mentioned in its orders, but that the subscription to the stock of the Missouri and Mississippi Railroad Company was actually made and the bonds issued, not, as alleged in the petition and alternative writ in this case, under the general law of the State of Missouri, but solely under and by virtue of an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, it is, therefore, considered and adjudged by the court that the return of the de-
91 fendants to the writ is sufficient, and that the said defendant has shown good and sufficient cause why a peremptory writ should not issue as prayed for, and it is, therefore, ordered and adjudged by the court that the relator take nothing by his said writ, and that the defendants go hence without day, and that it recover of the relator, George W. Harshman, its costs & charges herein expended, & that execution issue therefor.

Afterwards, to wit, on the 1st day of November, 1883, relator filed the following motion:

THE UNITED STATES *ex rel.* HARSHMAN
vs.
THE KNOX COUNTY COURT.

The relator moves the court to set aside the verdict and judgment herein, and to order the peremptory writ to issue as heretofore prayed, because—

1. The judgment of the 28th March, 1881, recited in relator's information and read in evidence, is conclusive upon respondents, and they are precluded from averring the facts pleaded in their return.

2. The court erred in admitting evidence in support of respondents' return.

3. The court erred in instructing the jury.

4. Upon the evidence submitted the relator is entitled to the peremptory writ as prayed.

5. The recital in the bonds on which the relator's judgment is founded is of no force as against him.

6. The verdict upon the second issue submitted to the jury is against the evidence and against the law.

92 7. The orders of the county court of Knox county, read in evidence, authorized the subscription which was made May 13th, 1867, as shown in evidence, and said subscription was made in pursuance of said orders and of the vote of the people taken thereunder, March 12th, 1867, as shown in evidence, and in pursuance of the general railroad law, and the bonds on which relator's judgment is founded were likewise issued under said law and in pursuance of said vote.

T. K. SKINKER,
Att'y for Relator.

This motion was, on the 7th day of January, 1884, by the court overruled; to which action of the court relator at the time excepted, and he now presents this his bill of exceptions, and prays that the same may be allowed, signed, and sealed, which is accordingly done this 17th day of January, 1884.

SAMUEL TREAT, *Judge.* [SEAL.]

And afterwards, to wit, on the 18th day of March, A. D. 1884, the following further proceedings were had and appear of record in said cause, to wit:

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
THE COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, Respondents. } 1796.

Now comes the relator, by attorney, and presents to the court an appeal bond in the sum of $500, which bond is approved and ordered to be filed.

Said bond is in words and figures following, to wit:

93 Know all men by these presents that we, G. W. Harshman, as principal, and John M. Gilkeson, as surety, are held and firmly bound unto The County Court of Knox County and the Justices thereof in the full and just sum of five hundred dollars, to be paid to the said County Court of Knox County and the Justices thereof, — heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the September term, 1883, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between The United States *ex rel.* George W. Harshman, relator, and The County Court of Knox County and the Justices thereof, respondents, judgment was rendered against the said relator, and the said relator having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a

citation, directed to the said County Court of Knox County and the Justices thereof, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said relator shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

GEO. W. HARSHMAN, [SEAL.]
By T. K. SKINKER, [SEAL.]
His Att'y.
JNO. M. GILKESON. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

94 [Endorsed:] No. 1796. United States circuit court, eastern district of Missouri. The United States *ex rel.* Geo. W. Harshman *vs.* The County Court of Knox Co. *et al.* Bond. $500. Geo. W. Harshman, principal. Jno. M. Gilkeson, surety. Filed 18th day of March, 1884. A. P. Selby, clerk.

95 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings of record in case No. 1796 of United States *ex rel.* George W. Harshman, relator, against The County Court of Knox County and the Judges thereof, respondents, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office, in the city of St. Louis, in said district, this seventh day of February, in the year of our Lord eighteen hundred and eighty-four.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

96 [Endorsed:] No. 1796. United States circuit court, eastern district of Missouri. United States *ex rel.* George W. Harshman against The County Court of Knox County and the Judges thereof. Duly certified transcript of the record in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 258. The United States *ex rel.* George W. Harshman, plaintiff in error, *vs.* The County Court of Knox County and the Justices thereof. Filed 18th June, 1884.

22-306

FILED
APR 23 1887
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court OF THE United States.

OCTOBER TERM, 1886.

THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN,

Plaintiff in Error,

vs.

No. 258.

THE COUNTY COURT OF KNOX COUNTY AND THE JUSTICES THEREOF,

Defendants in Error.

STATEMENT OF THE CASE FOR THE PLAINTIFF IN ERROR.

T. K. SKINKER,
Of Counsel for Relator.

ST. LOUIS: PRINTED BY CENTRAL LAW JOURNAL.

IN THE

Supreme Court OF THE United States.

OCTOBER TERM, 1886.

THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN,

Plaintiff in Error,

vs.

THE COUNTY COURT OF KNOX COUNTY AND THE JUSTICES THEREOF,

Defendants in Error.

No. 258.

STATEMENT OF THE CASE FOR THE PLAINTIFF IN ERROR.

This is a proceeding by *mandamus* against the justices of the County Court of Knox county to compel them to levy a tax sufficient to pay a judgment for $77,374.46, obtained by the relator (Harshman) on the 28th of March, 1881, against that county, in the Circuit Court for the Eastern District of Missouri.

The information alleges that "said judgment was recovered upon bonds and coupons issued by said county in part payment of a subscription made by said county on the 9th day of June, 1867, to the capi-

tal stock of the Missouri & Mississippi Railroad Company, a railroad company duly organized under the laws of the State of Missouri; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the County Court of said county, on the 12th day of March, 1867, under the seventeenth section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that relator had requested the said County Court and the justices thereof to levy a special tax upon all property in said county, made taxable by law for county purposes, and upon the actual capital that all merchants, grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment;" that the County Court refused and neglected to make said levy, and that the county had no property out of which the judgment could be made.

The alternative writ was issued and served, and in due time the respondents made return substantially as follows:

They denied that the bonds and coupons on which relator obtained his judgment were issued to pay any subscription authorized by a vote of the qualified voters of Knox county, and denied that two-thirds of the qualified voters of the county ever voted in favor of or assented to the making of any subscription to the capital stock of the Missouri & Mississippi Railroad Company. They averred that, in point of fact, on the 13th of May, 1867, the County Court of said county made a subscription to the capital stock of said

company in the sum of $100,000, and on the 2d of May, 1870, said court made a further subscription to the stock of said company in the sum of $55,000; that in payment of both of these subscriptions said court issued bonds of the denominations of $500 and $50; that fifty-eight of relator's said bonds are of the first of these issues, and sixty are of the second; that both of these subscriptions were made without the assent of two-thirds of the qualified voters of the county, and, indeed, without any vote being taken at all, and against the will of said qualified voters; that they were made by authority only of section 13 of the charter of the Missouri & Mississippi Railroad Company, being an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865. (Q. V. *infra*, p.); that each of relator's said bonds contains on its face a recital that it is issued under and pursuant to orders of the County Court of Knox county to the Missouri & Mississippi Railroad Company, for subscription to the capital stock of said company, as authorized by "An act to incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865; and that said court has each year since the issue of said bonds levied a tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and has caused the same to be extended on the tax books of said county for each year, and has had said tax collected for the purpose of paying said bonds and coupons.

On the incoming of the return, relator moved to quash the same for the following reasons:

1. The averments of the said return, and the matters and things therein set forth, are inconsistent with, and contradictory of the record in this case, and the solemn admissions therein made by the county.

2. The record and judgment in this case forever conclude and debar respondents from denying that the bonds and coupons on which said judgment was rendered were authorized by a vote of two-thirds of the qualified voters of said county, taken at an election held pursuant to section seventeen of Chapter 63, of the General Statutes of Missouri of 1866, then in force, and from averring that they were issued by the County Court of said county in pursuance only of the charter of the Missouri & Mississippi Railroad Company, upon its own mere motion, and without the assent and against the will of two-thirds of the qualified voters of said county.

The record and judgment thus relied on are the record and judgment in the principal case of George W. Harshman v. Knox County, the judgment to be enforced, and consist of the petition, the summons, and marshal's return of service, and the entry of judgment by default.

The petition averred that, "on the 9th day of June, 1867, the County of Knox subscribed to the capital stock of the Missouri & Mississippi Railroad Company, a railroad company duly organized under the laws of this State, the sum of $100,000; that said subscription was authorized by a vote of the people of said county, at a special election held pursuant to an order of the County Court of said county, on the 12th day of March, 1867, under the seventeenth section of Chapter 63, of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of, and assented to the making of said subscription; that in part payment of said subscription said county executed and issued divers bonds with coupons for interest attached;" that the plaintiff, Harshman, was

the owner of certain of said bonds and coupons, all of which were fully and particularly described in the petition, and judgment thereon was prayed in due form.

The writ of summons was duly issued, returnable on the third Monday, being the 21st day of March, 1881, and on the 4th of that month, as appears by the marshal's return, it was served by delivering a copy of the writ, together with a copy of the petition, to the clerk of the County Court, the mode of service provided by law.

On the 28th of March, 1881, judgment was entered against defendant by default, containing, among others, the following recital: "This action being founded upon certain bonds and coupons for interest thereon issued by said defendant, and described in the petition, the court finds that the plaintiff has sustained damages by reason of the non-payment thereof in the sum of $77,374.46. It is therefore considered by the court, that the plaintiff have, and recover of defendant" the said sum, etc.

The foregoing motion to quash was overruled.

Thereupon relator filed an answer, and afterwards an amended answer to the respondents' return, setting up the following facts:

That on the 6th of February, 1867, the County Court of Knox county made, and entered of record an order, directing an election to be held on the 12th of March, 1867, at the various voting precincts in the county, to ascertain the sense of the people of the county as to whether or not they would authorize the County Court to subscribe stock to the amount of $100,000 to a railroad company, which might construct a railroad running from West Quincy, in Mis-

souri, west through Knox county, to some point on the Missouri river, or in a company which might construct a railroad from Alexandria, in Missouri, southwest through said county, to intersect the North Missouri Railroad, at or near Macon City, or in any other railroad company, which might duly organize under the laws of Missouri, and construct a railroad through Knox county, running through Edina and connecting with the North Missouri Railroad, or running to Quincy, in Illinois, or Macon, in Missouri, or any point on the Missouri or Mississippi river, such stock to be taken subject to the condition, that it should be payable in bonds of the county, bearing seven per cent. interest, and running ten years; that on the 4th of March, 1867, a further order was made by said court, whereby the order of February 6th was modified and amended, so as to make Edina the county-seat of Knox county, a point on the line of any company, to the stock of which the court should be authorized to subscribe, in case the qualified voters should at the election assent to the making of any subscription; that said election was held on the 12th of March, 1867, as averred in the information, and 510 votes were cast in favor of making said subscription, and 98 votes were cast against making said subscription; that at the time said orders were made and said election was held, the Missouri & Mississippi Railroad Company was by law authorized to construct, and was contemplating the construction of its railroad from the town of Macon, in Missouri, through the said town of Edina, in Knox county, to Alexandria, in Missouri, or Keokuk, in Iowa; that in pursuance of authority in them vested by the general railroad law of the State, and by the vote of the people aforesaid, the County Court thereafter made said subscription of $100,000 to the capital stock of the Missouri &

Mississippi Railroad Company, and, among others, issued in payment thereof the bonds upon which relator's said judgment was obtained; that from the time of making said subscription, and issuing said bonds, the county court never confined itself, in levying taxes to pay interest on said bonds, to the power conferred by the thirteenth section of said charter, but, on the contrary, levied taxes greatly in excess of the charter limit of one-twentieth of one per cent., and levied the same under, and in pursuance of power conferred alone by the general railroad law of the State, and that such levies were at the following rates, to-wit:

In the year 1867, 30 cents on the $100.
" " 1868, 33⅓ " " "
" " 1869, 30 " " "
" " 1870, 33⅓ " " "
" " 1871, 50 " " "
" " 1872, 50 " " "
" " 1873, 25 " " "
" " 1874, 75 " " "

That the taxes so levied were at all times fully paid by the tax-payers of the county, and the proceeds thereof were used by said county to pay interest on said bonds, and the interest on all the bonds issued by said county to, and in aid of said railroad was fully paid, during all the years named, with the proceeds of the taxes so levied and paid; that the form of the bonds was drawn up by the railroad company, and was by it furnished to the authorities of the county, and was by them adopted and used without reflection, as to the significance of any recitals therein, and without any intention on the part of said authorities, or of said county to assert that said bonds were not issued under the general law, or to

waive the right of said county to levy and collect taxes under the general law to pay said bonds and the interest thereon.

To this answer respondents filed a reply, denying every allegation thereof inconsistent with the return.

Upon the issues thus framed there was a trial before a jury, at which the relator first offered the petition, the summons and the marshal's return thereon, and the judgment in the principal case of Harshman v. Knox County, as hereinbefore set out. On objection made by respondents, the court ruled that these papers could not be read unless the relator would also read the bonds filed with the petition. To this ruling relator at the time excepted. The relator then offered and was permitted to read the said petition, summons, marshal's return and judgment, and also the bonds. Each of said bonds contains this recital:

"This bond being issued under and pursuant to orders of the County Court of Knox county, for subscription to the stock of the Missouri & Mississippi Railroad Company as authorized by an act of the General Assembly of the State of Missouri, entitled, 'An act to incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865."

Relator then read in evidence sections 1, 7 and 13 of this act. Section 1 incorporates the company. Section 2 gives it power to construct a railroad, and defines its route to be "from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri."

Section 13 provides: "It shall be lawful for the corporate authorities of any city or town, the County Court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of taxable property for each year."

Relator then read in evidence the orders of the County Court of the 6th of February and the 4th of March, 1867, being the same in substance as set forth in his answer to respondents' return, and also an order of the 8th of February, 1867, appointing judges and arranging other details of the election, to be held on the 12th of March ensuing.

Relator then read in evidence the official returns of said election, dated March 18, 1867, showing 510 votes cast in favor of subscription and 98 votes against subscription.

Relator next showed by the records of the County Court that, between the 18th of March and the 6th of May, 1867, the court was not in session, and then read in evidence an order of the court made on the 13th of May, 1867, as follows:

"Now, at this day, it is ordered by the court that the president justice of this court be and is hereby authorized to subscribe for and in the name of the County of Knox, for the use of the inhabitants thereof, one thousand shares of stock in the capital stock of the Missouri & Mississippi Railroad Company, upon the following terms and limitations: 1st. That the sum of one half of one per cent. of said stock, being $100,000, be paid in cash to defray expenses of survey of said road through Knox county. 2d. That the remaining 99½ per cent. of said stock be issued in bonds of the County of Knox, bearing seven per cent.

interest per annum and running ten years with coupons attached, the interest on said bonds payable annually at the treasury of said county; said bonds to be signed by the president justice of said County Court and attested by the clerk thereof, and made payable to said railroad company upon order of the president and directors thereof; but in no case shall bonds be issued except for work actually done on said railroad within the limits of Knox county, which amount of work shall in all cases be shown by the estimate of the engineer of said road, verified by his affidavit, which said estimates shall be filed in the office of the clerk of this court."

Relator next read in evidence an order of said County Court made on the 16th of May, 1867, whereby the court levied a tax of twenty-five cents on each $100 worth of property in the county, to pay interest on bonds to be issued under the above order of May 13th to said company.

Relator also read in evidence orders made at the May terms of said court in subsequent years, whereby tax levies were made to pay interest on bonds issued to said company as follows:

In the year 1868, 30 cents on each $100.
" " 1869, 30 " " "
" " 1870, 33⅓ " " "
" " 1871, 50 " " "
" " 1872, 50 " " "
" " 1873, 25 " " "
" " 1874, 75 " " "
" " 1875, 5 " " "

Relator next introduced as a witness,

William F. Plumer, who testified, in substance, that in 1867 he was one of the judges of the Knox

County Court, and as such participated in making the subscription of May 13th of that year; that in making that subscription the court acted in pursuance of the vote of the people, taken on the 12th of March previous, and considered that they were carrying out the will of the people as expressed in that vote, and were acting under the general railroad law of the State, which required a vote to be taken before any subscription was made; that the court had been asked to subscribe without a vote, but were unwilling to assume the responsibility and had declined to do so, and would not have made the subscription or issued the bonds had it not been for the vote; that the court understood that there were two laws in force under either of which they might proceed—the general law which required a vote, and the special act incorporating the railroad company which did not require a vote—before subscribing; and further understood that if they proceeded under the special act, taxation to pay the bonds would be limited to one-twentieth of one per cent., but if under the other, they supposed there would be no such limit; that in making the levy of May 16, 1867, they were acting upon that idea; that witness did not understand the recital in the bonds as asserting anything to the contrary of this, and did not mean, when issuing those bonds, to assert by this recital that, in making the subscription and issuing the bonds, the court proceeded of its own motion, under authority given by the charter and without reference to the vote; nor did he believe that the other members of the court or the court, as a body, intended so to assert; that the members of the court consulted together fully, and were of one mind in the matter.

Witness could not say that the recital, "As authorized by an act of the General Assembly of the State of Missouri, entitled 'An Act to incorporate the

Missouri & Mississippi Railroad Company,' approved February 20, 1865,'' was put into the bond by mistake. Neither himself, nor either of his associates, nor the clerk of the court, was a lawyer; the form of the bond was intrusted to the clerk; but witness thought this recital should have been that the bond was issued to a railroad company authorized by the special act, but the court were acting in pursuance of the vote under the general law, to issue the bonds and raise money to pay interest on them.

Relator next called:

Abner L. Gilstrap, who testified that, on and prior to the 13th of May, 1867, he was president of the M. & M. R. R. Co.; that at that time said company was contemplating and endeavoring to secure the construction of a line of railroad from Macon City, in Macon county, Missouri, through Edina, in Knox county, to Alexandria, in Clark county. Witness then produced and identified the journal of the proceedings of the board of directors of said company, and read from said journal a resolution of said board adopted at a meeting held on the 13th of May, 1867, at Edina, accepting the subscription to the capital stock of said company that day made by said County Court; and also read a resolution of said board appointing himself and two others a committee to draw up forms of certificates of stock and other instruments to be used by said company, including bonds to be issued by counties to said company. Witness testified that, in compliance with said resolution, he drew up a form for such bonds; that in the county of Macon, where he himself resided, a subscription payable in bonds had already been made by the County Court of said county, without taking a vote of the people; that he drew up a form applicable to that case; that he

sent this form to all the counties which were subscribing to his company, including Knox, and that the bonds before the court in this case are in the form drawn by him. Witness was of the opinion, at the time this subscription was made, that the County Court had power to subscribe under the charter without a vote of the people.

The decision of the Supreme Court of Missouri, in the case of the State *ex rel.* The Missouri & Mississippi Railroad Co. v. The County Court of Macon County, reported in vol. 41, Mo. Rep. p. 453, by which it was for the first time judicially determined that a subscription could be made to the stock of this company, was not promulgated until October 25, 1867.

Relator produced evidence showing that the fifty-eight bonds described in the first paragraph of his petition were issued in pursuance of the order of subscription of March 13, 1867, at various times during the year 1868, but not the remaining sixty bonds.

Relator also offered evidence showing that the taxes levied by the County Court, as above set forth, were paid by the tax-payers of said county, as fully and punctually as other taxes, and that the proceeds of said taxes were applied from time to time to the payment of coupons for interest maturing on all said bonds, as the same matured, without distinction of class, and that all such coupons were paid up to and including the year 1874.

Relator here rested.

Thereupon the court instructed the jury as follows:

The issues of fact submitted to you are:

First. Was there an election held under the orders of the County Court, read in evidence, and did two-

thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the County Court to the stock mentioned in said orders?

Whether or not the required number of voters cast their votes at said election, if held, is conclusively established by the records of the court, behind which no inquiry of fact is permissible.

Second. Was the subscription to stock in the railroad company actually made, not as recited in said bonds, under the charter of the Missouri & Mississippi Railroad Company, but under the general law, whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people? In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence?

The jury are instructed that, to overcome the recitals in the bonds issued by the County Court under its seal, the evidence must be clear and positive, full and explicit, and that the burden of proving the alleged mistake so as to overthrow said recitals is upon the relator in this case. And the court further instructs the jury that the evidence to overcome said recitals is insufficient.

The jurors will answer said inquiries affirmatively or negatively—that is, yes or no—to each of said inquiries.

Under the instructions thus given the jury should answer the first inquiry, Yes; and the second inquiry, No.

The jury answered accordingly, and there was a judgment denying the peremptory writ of *mandamus*.

In due time the relator moved the court to set aside the verdict and judgment, and to order a peremptory writ, assigning the following reasons:

1. The judgment of the 28th of March, 1881, recited in relator's information, and read in evidence, is conclusive upon respondents, and they are precluded from averring the facts pleaded in their return.

2. The court erred in admitting evidence in support of respondents' return.

3. The court erred in instructing the jury.

4. Upon the evidence submitted, the relator is entitled to the peremptory writ as prayed.

5. The recital in the bonds on which the relator's judgment is founded is of no force as against him.

6. The verdict upon the second issue submitted to the jury is against the evidence and against the law.

7. The orders of the County Court of Knox county, read in evidence, authorized the subscription, which was made May 13, 1867, as shown in evidence; and said subscription was made in pursuance of said order, and of the vote of the people taken thereunder, March 12, 1867, as shown in evidence, in pursuance of the general railroad law; and the bonds on which relator's judgment is founded were likewise issued under said law, and in pursuance of said vote.

This motion was overruled, all exceptions were duly preserved, and relator sued out his writ of error.

BRIEF.

I.

The County Court had the power, in subscribing to the stock of the Missouri & Mississippi Railroad Company and issuing bonds, to proceed either under the charter of that company, or under the general railroad law, at its election.

II.

If the court proceeded under the general law, the power of taxation to pay the bonds is unlimited, and the relator is entitled to his peremptory writ.

III.

The record and judgment of March 28, 1881, in the principal case of Harshman v. Knox County, are conclusive that the proceeding which resulted in the issue of the bonds was taken in pursuance of the general railroad law, that there was a vote, and that two-thirds of the qualified voters of the county voted in favor of subscription.

IV.

The court erred in submitting the second issue to the jury, and in the instruction given thereon.

1. Because it misinterprets the recital in the bonds.

2. Because the issue submitted is not the true issue in the case, and the rule of evidence applied by the instruction is not the one applicable to the case.

3. Because upon the facts as shown in evidence the relator was entitled to judgment.

ARGUMENT.

I.

The County Court had the power, in subscribing to the stock of the Missouri & Mississippi Railroad Company and issuing bonds, to proceed either under the charter of that company, or under the general railroad law, at its election.

Section 13 of the charter provides:

It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.

Laws of Missouri, 1865, p. 88.

Section 17 of the General Railroad Law provides:

It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to any railroad company, duly organized under this or *any other law of the State;* provided, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription.

Gen. Stat. Mo. 1865, p. 338.

This section applies to railroad companies created by special laws, like the charter of the Missouri & Mississippi Railroad Company, and authorizes subscriptions to be made to such companies, provided the assent of the qualified voters is obtained.

Cape Girardeau, etc. Co. v. Dennis, 67 Mo. 438.

Chouteau v. Allen, 70 Mo. 290, 326.
Foote v. Howard County Court, 1 McCrary, 218.

II.

If the court proceeded under the general law, the power of taxation to pay the bonds is unlimited, and the relator is entitled to his peremptory writ.

Section 18 of the General Railroad Law provides:

Upon the making of such subscription by any county court, city or town, as provided for in the previous section, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town, making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town, to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription.

This section entitles the relator to have a tax levied sufficient to pay his judgment.

United States v. The County of Macon, 99 U. S. 582. 591.
Foote v. Howard County Court, 1 McCrary 218.

III.

The record and judgment of March 28, 1881, in

the principal case of Harshman v. Knox County, are conclusive that the proceeding, which resulted in the issue of the bonds, was taken in pursuance of the general railroad law, that there was a vote, and that two-thirds of the qualified voters of the county voted in favor of subscription.

The judgment is a judgment by default, in the ordinary form. The petition contained the following averments: "That said subscription was authorized by a vote of the people of said county of Knox, taken at an election held pursuant to an order of the County Court of said county on the 12th day of March, 1867, under the seventeenth section of Chapter 63 of the General Statutes of Missouri, of 1866, at which election two-thirds of the qualified voters of said county voted in favor of said subscription; that in part payment thereof defendant executed and issued said bonds."

1. The settled rule in *mandamus* proceedings is that the judgment is conclusive of every fact involved in it.

In Ralls Co. Ct. v. U. S., 105 U. S. 733, Mr. Chief Justice Waite said (at p. 734):

"In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to these defenses it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri, in State v. Rainey, 74 Mo. 229, and the principle on which the decision rests is elementary."

To the same effect:

U. S. v. New Orleans, 98 U. S. 395.
The Mayor v. Lord, 9 Wall. 413.
Supervisors v. U. S., 4 Wall. 435.
Lincoln Co. Ct. v. U. S., 105 U. S. 739.
Louis v. Brown Township, 109 U. S. 163.
Nelson v. St. Martin's Parish, 111 U. S. 716.

In Clews v. Lee Co., 2 Woods, 475, a *mandamus* proceeding to compel levy of a tax to pay a judgment on bonds, the return set up that the bonds were void in the hands of the first holder, the railroad company, because the law authorizing their issue had not been complied with, and that Clews was not a *bona fide* holder for value.

Woods J. said: "These matters must have necessarily have been passed upon by the court adversely to the assertions of defendant before judgment could have been rendered for plaintiff. Having had its day in court upon these issues, can they be again raised upon this motion? The respondents are concluded by the judgment at law. *They can not go behind it to raise any question touching the causes of action upon which it was rendered.*"

In State v. Supervisors, 20 Wis. 79, 85, it is held that, as the town had full and ample opportunity to raise all questions as to the validity of the bonds, it was estopped by the judgment to re-raise them in a *mandamus* brought to enforce the judgment.

In State v. Rainey, 74 Mo. 229, it was held that the question of the validity of the bonds on which the judgment was rendered, "was conclusively determined against the county in the judgment rendered."

In School District No. 11 v. Lauderbaugh, 80 Mo. 190, it is held that, when a legal liability has once been judicially ascertained, it will suffice, in a proceed-

ing by *mandamus* to enforce it, to state that fact. The circumstances out of which it grows need not be stated; both the facts and the liability are *res judicata*.

In Huntington v. Smith, 25 Ind. 486, *held* that the respondents to a writ, sued out to compel them to levy a tax to pay damages awarded in a proceeding to open a road, could not attack the regularity of the proceeding.

These cases go to the extent of prohibiting the re-agitation, not only of the question as to the validity of the bonds, but of any fact involved in the judgment, as shown by the petition upon which it is founded.

The elementary principle referred to by Waite, C. J., in the Ralls County case, *supra*, is that "it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel."

Outram v. Moorewood, 3 East, 346, cited in Cromwell v. Sac Co., 94 U. S. 352.

It is the "allegation on record" which estops.
Embury v. Conner, 3 Comst. 511.

Or, as stated in Burlen v. Shannon, 99 Mass. 202: "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the ground-work upon which it must have been founded."

"As to things material and traversable, the judgment is conclusive and final."
1 Greenl. Ev. Sec. 330.

In Aurora City v. West, 7 Wall. 99: "Since the resolution in Ferrer's case, the general principle has always been conceded that, when one is barred in any action, real or personal, by judgment on demurrer,

confession or verdict, he is barred as to that or the like action of the like nature for the same thing forever."

Dimock v. Revere Copper Company, 117 U. S. 559.

If the respondents can now controvert any one of the allegations of the petition on which this judgment is founded, they can controvert any other or all of them, *e. g.*, that the plaintiff was a *bona fide* holder; that the bonds were executed by lawful officers of the county; that they were issued for a subscription to a railroad; that they bore seven per cent. interest; or that the law under which they purported to be issued, either was unconstitutional or, for some other reason, did not authorize their issue. Each one of these things it has been held, in some one or more of the foregoing cases, are put beyond controversy by the judgment, so that in a *mandamus* proceeding no question can be raised upon it.

This is the general rule in all proceedings after judgment.

In Missouri, every demand against the estate of a decedent, after being allowed, is assigned by the court to a class, and all demands of one class are to be paid in full out of the general estate, before anything is paid on those assigned to the class next in order. A judgment for damages for deforcement of dower is by the statute recoverable only out of the land in which dower has been assigned. In Brown v. Woody, 22 Mo. App. 253, such judgment was presented to the Probate Court, and assigned to the fifth class. The administrator afterwards resisting payment: *Held*, that notwithstanding the judgment was not originally a general demand against the estate, yet the classification made it such and operated as a *res judicata*.

In Stewart v. Nelson, 79 Mo. 522, it is held, that a verdict and judgment upon a question of fact on the trial of a plea in abatement in attachment, are conclusive of the same question upon a trial on the merits.

In Shackelford v. Cunningham, 41 Ala. 203, it was held that, "on motion to enter satisfaction of a probate decree, and to supersede an execution issued thereon, no matter can be brought forward which is antecedent to, and involved in the decree."

In Laug v. Brown, 21 Ala. 191: *Held*, that "it is not competent for the court, upon exceptions, to make an order which is not consistent with the original decree. From the time of the pronunciation of that decree, all the subsequent proceedings should be consistent with it." Citing Dan. Chan. Pr. and Pldg. 1499.

Sewell v. Scott, 35 La. An. 553. "It matters not under what form, whether by petition, exception, rule or intervention, the question is presented, whenever the same questien recurs between the same parties, the plea of *res judicata* estops."

2. Again, the writ of *mandamus*, when used to compel payment of a judgment, is in the nature of an execution, and a substitute for it.

Thompson v. U. S. 103 U. S. 484.
Supervisors v. Durant, 9 Wall. 417.
Riggs v. Johnson Co., 6 Wall. 166.

And, like an execution, should give the plaintiff the full measure of remedy, to which by the record of the judgment as rendered he appears to be entitled. Cases possibly may arise, in which the record does not disclose enough to enable the court to determine what the extent of the remedy is; and in such cases, no doubt, the court may obtain information *aliunde*; but

certainly the record, if sufficient for the purposes, should be conclusive, and nothing should be heard contradictory of it.

Huffer v. Allen, L. R. 2 Ex. 15.

Otherwise the court may find itself in this position, that in rendering judgment it acts upon one state of facts as true, and in awarding execution upon another and different state of facts.

In this case, the court gave judgment for the plaintiff upon the theory that the bonds were voted by the people. It then denied the relator's application for *mandamus* upon the theory that the bonds were not voted. No court ought to suffer itself to be put into the position of acting on two opposite views of the same transaction at different stages of the same proceeding.

The rule we rely upon is that which secures the plaintiff in the enjoyment of whatever attaches, as a legal incident, to his judgment.

Thus, in Baron v. Abeel, 3 John. 481 (an action for *mesne* profits), it was said by Van Ness, J.:

"The effect of a judgment in ejectment, whether by default or otherwise, upon the rights of the parties, is substantially the same as in personal actions. The form of the proceedings is different, but after judgment the legal consequences are essentially the same. One of these consequences is that the lessor has the right to bring an action for the *mesne* profits. * * * In this action the defendant is precluded from setting up any defense of which he might have availed himself in the original action of ejectment. It has been said that there is a difference in this respect between a judgment by default and a judgment after verdict, but it has been settled otherwise" (citing Lord Mansfield in Aslin v. Parker, 2 Burr. 665, and Ch. J. Wilmot in Goodtitle v. Tombs, 3 Wils. 118). "By suffering a

judgment to go by default the defendant admitted himself to be in possession, and it is now too late for him to controvert that fact. There is no greater hardship in this case than in every other where the defendant suffers judgment to be entered against him by neglecting to appear and defend the suit."

In People v. Superior Court, 5 Wend. 114, it is said:

"General principles, whose operation has been found salutary and which have grown into authority under the sanction of repeated decisions and almost immemorial usage, can not yield to the hardship of particular cases."

A legal incident to the judgment in this case, or rather the legal consequence of it, is the right to have a tax levied sufficient to pay it. This the respondents are seeking to deprive us of, in violation of established rules, by showing that our record is not true.

3. The rule that a record is conclusive as to the truth of the allegations contained in it, when it is invoked in a subsequent case, is limited to such allegations as are material.

Conceding the same limitation to apply when the record is invoked in supplementary proceedings *in the same case*, let us inquire whether the allegation as to the vote was material to the plaintiff's recovery in this case.

(*a.*) The allegation, as made, sets forth the state of facts under which alone, but for certain special statutes, county courts in Missouri could subscribe bonds to railroad companies at the time this subscription was made. On the face of it, therefore, there can be no doubt of its materiality.

There was, however, a special statute in force, the charter of this company, which authorized subscrip-

tions to be made to it without a voter; and it may be said that owing to that fact the county was liable upon the bonds whether there was a vote or not, and hence it was useless for the county to contest the allegation of a vote.

To this we answer that "nothing can be added to or taken from a record by any explanation tending to show why it was not differently made."

Cragin v. Carleton, 31 Me. 492.

In other words, we argue that if a defendant has incurred a liability of such a character that it may be put upon either of two grounds, and he suffers judgment to go against him upon a petition alleging one of the grounds, he can not afterwards show that the other was the true ground, for, as said in Outram v. Morewood, it is the matter alleged as ground of recovery, and not the recovery itself, which constitutes the estoppel.

Lentz v. Wallace, 17 Pa. St. 412.

It is of no consequence, therefore, that the plaintiff might have made a different case and still have recovered. The test of materiality is not that he could not have recovered upon any other state of facts than that alleged, but that, as the case was presented, the facts alleged were essential to authorize the judgment. In other words, the question of materiality must be determined by reference to the pleadings as the case was presented to the court, not as it might have been presented.

(*b.*) From another standpoint it is equally plain that the allegations as to a vote were most material. It will not be questioned that the averments of the

petition, after judgment, are binding upon the plaintiff at least.

Ewing v. McNairy, 20 Ohio St. 321.

If, in his petition, Harshman had alleged that the bonds were issued without a vote, he could not, in applying for a *mandamus* for a tax, allege that they were issued upon a vote; and on the other hand, if the petition alleged a vote, he could not allege that there was no vote. He must, therefore, choose one position or the other, and as he had to abide the consequences, it was most material to him to make the proper choice; and as it was material to him, it could not be otherwise to the county; for mutuality is the essence of the law of estoppel, whether it be estoppel *in pais*, or estoppel by record.

(*c.*) To be immaterial, an issue made or decision rendered must be entirely gratuitous. * * * Thus, a gratuitous decision of a question of fraud, having no effect when rendered, can have none afterward, and can not supplant another inquiry on the same point when this becomes necessary.

Wells on *Res Adjudicata*, § 225.

In Fulton v. Hanlow, 20 Cal. 450, it is said:

"Where, in an ejectment suit, the consideration of the character of the title is foreign to the case and unnecessary for its disposition, any declaration in the decree as to that title is without any binding force, as an adjudication, upon the parties."

To apply this principle to the present case—suppose the petition, in addition to the allegations now in it, had contained others to the effect that, besides the bonds sued on, the county had, at the same time and by authority of the same vote, issued other bonds, say for the purpose of building a court-house, but had not averred that plaintiff owned any, and had asked no

judgment on any such bonds. These allegations would be clearly impertinent and gratuitous, and in a subsequent action between the same parties on the court-house bonds the judgment would be held not binding as to them; and this for the reason that the judgment was in nowise founded on these allegations, or even if the judgment in express terms professed to find them to be true, it found something palpably foreign to the real issues in the case.

The difference between the case supposed and the present one is manifest; and the rule announced by Mr. Wells and supported by authority, sets in a strong light the materiality of the allegations made in this petition as to the vote.

(*d.*) Again, the fact that the charter of the Missouri & Mississippi Railroad Company authorized subscriptions without a vote, can not be made the basis of an argument that the court, in rendering judgment, paid no attention to the allegations in question, and they may, therefore, be regarded as surplusage.

As the case stands upon the record, these allegations are essential to support the judgment. No reference is made to the charter, and, therefore, in legal contemplation, it could not have been in the mind of the court.

In U. S. v. Wilson, 7 Pet. 161, Chief Justice Marshall said:

"It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing, respecting a particular case, of which he is not informed judicially."

In Town of Butler v. Robinson, 75 Mo. 190, it is held, that courts will take judicial notice of acts of

municipal incorporation, not expressly declared to be public acts, only when pleaded.

See R. S. Mo. 1879, Sec. 3549.
Bowie v. Kansas City, 51 Mo. 454.
Covington Bridge Co. v. Shepherd, 20 How. 227.
R. R. Co. v. The Bank, 12 Wall. 230.

As a legal proposition, therefore, it is wholly inadmissible to say that the court had any knowledge of the Missouri & Mississipi Railroad charter when it rendered this judgment, or that the judgment draws any support from the charter.

If it be urged that the plaintiff could have recovered without proving a vote, had the matter been contested, we answer, that he could not, on the pleadings as drawn. To do this he would have been obliged to offer the charter in evidence, and this he could not do without pleading it. True, he might have been allowed to amend by pleading the charter, but had he done so he would have effectually cut himself off from the present proceeding.

4. This judgment is not the less conclusive because it was rendered upon default of the defendant.

The State v. Rainey, 74 Mo. 232.

In Gifford v. Thorn, 9 N. J. Eq. 722, it is said:

"The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default, or upon confession, is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict."

Green v. Hamilton, 16 Md. 329:

"A judgment by default, if regularly entered, is

as binding as any other, as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of recovery in some cases remains to be ascertained by a jury. When determined, we are not aware of any rule or principle of law which attributes to such a finding less dignity or efficacy than to a verdict found upon issues. * * * We are satisfied that a party defendant who had been present at the trial could not be relieved on any of the grounds suggested, and to allow a defendant who was absent, without any fault on the part of his adversary, to come in after the term and have redress, would be reversing the maxim, '*vigilantibus non dormientibus leges subveniunt.*' ''

To same effect:

Mailhouse v. Inloes, 18 Md. 333.

A judgment by default, while not admitting anything necessary to be proved upon the assessment of damages, admits the averment of the cause of action as alleged in the petition.

Burlington, etc. R. R. v. Shaw, 5 Iowa, 463.
Welch v. Wadsworth, 30 Conn. 149.
Kiersted v. Rogers, 6 H. & J. 285.
Briggs v. Richmond, 10 Pick. 391.

In equity, when defendant fails to answer, the bill is taken *pro confesso*, the consequence of which is that every allegation of the bill is considered as confessed.

Atty. Gen. v. Carver, 12 Ired. 235.
Luckett v. White, 10 Gill & J. 489.

At least, every distinct and positive allegation.

Atkins v. Faulkner, 11 Iowa, 326.
Platt v. Judson, 3 Blackf. 235.

Brown v. Mayor, 66 N. Y. 390:

"When a matter in controversy between parties

has been submitted to a competent judicial tribunal, its decision thereon is final between the parties, until it has been reversed, set aside or vacated, and the rule of *res judicata* applies, * * not only to judgments rendered after litigation of the matter in controversy, but to judgments rendered upon default or confession."

To same effect:

Jarvis v. Driggs, 69 N. Y. 143.
Newton v. Hook, 48 N. Y. 676.
Gates v. Preston, 41 N. Y. 113.
White v. Merritt, 3 Seld. 355.
Cromwell v. Sac Co., 94 U. S. 356–7.

5. On the decision of the motion to quash, Judge McCary said:

"But it often happens that, for the purpose of determining what property is liable to be taken for the satisfaction of a judgment, it is necessary to look behind the judgment and into the contract upon which it was rendered. Questions of exemption are often determined by reference to the nature of the contract or its date. As, for example, where it is sought to enforce a judgment against property claimed as homestead, it may often be necessary to recovery to go back to the contract and ascertain whether it was executed before the debtor acquired the homestead, or whether it was a debt for which the homestead was liable, or whether the homestead right has been released. And so, in a case like the present, we must, in order to determine what remedies to apply, and what measure of taxation to enforce, look into the contract upon which the judgment was rendered." (See Rec., p. 13.)

I accept the analogy suggested as a fair one.

Mr. Thompson says, in his work on Homesteads and Exemptions, that:

"There is nothing in the nature of the homestead right to exempt it from the operation of this general principle."—*res judicata*. Sec. 715.

In Tadlock v. Eccles, 20 Tex. 791, the court makes the same remark, and adds:

"There are other rights secured by the constitution which are equally sacred and inviolable. The right of personal liberty and the right of personal security are not less so; yet these and every other right which is secured by the constitution and laws, may be divested by the judgment of a court of competent jurisdiction."

Numerous authorities cited by Mr. Thompson, sustain his statement. See among others:

Miller v. Sherry, 2 Wall. 237.
Lee v. Kingbury, 13 Tex. 70.
Larson v. Reynolds, 13 Iowa, 582.
Wilson v. Stripe, 4 Greene (Iowa), 551.

It is conceded by Judge McCrary, that the estoppel of a judgment ordinarily extends to whatever facts are alleged as the ground of recovery. The authorities show that this principle is applied no less in homestead and exemption cases than others, so that if the fact upon which the claim of exemption rests has been adjudicated in the principal action, it can not be re-agitated in any form of supplementary or subsequent proceeding. Three Illinois cases well illustrate this:

Wing v. Cropper, 35 Ill. 256. In this case, there had been a decree *pro confesso* of foreclosure of a mortgage, and a sale in pursuance of the decree, by a master, on the coming in of whose report the defendant filed a motion to set aside the sale, claiming the

mortgaged premises as his homestead. The motion was sustained. On appeal, Breese, J., said:

"This right" (of homestead) "is conferred by statute, and can be divested only in the mode provided by statute. A party may set it up in his answer to the bill, or he may claim it when the master proceeds to execute the decree. It is his duty to ascertain, a claim being made, if it is a homestead, and on his report coming in either party may except to his report and contest the claim of the homestead. *There is nothing alleged in the bill in this case about a homestead. Of course, then, taking the bill pro confesso does not amount to a confession of any fact not alleged in it. By failing to answer, the defendants admit only what is alleged in the bill.*"

In Asher v. Mitchell, 92 Ill. 483, it is expressly conceded by the court that if, in a suit for foreclosure of a mortgage, resulting in a decree of foreclosure, the homestead rights of the mortgagor are put in issue, the question can not afterward be raised by the mortgagor in ejectment brought against him by the purchaser under the decree.

In Goltra v. Green, 98 Ill. 322, which was ejectment by the purchaser for land bought at sale under decree of foreclosure, the court said:

"If the estate of homestead was one of the issues presented by the pleadings in the foreclosure case, and was passed upon by the court, the decree thus rendered is conclusive upon the Greens, who were parties to the chancery proceedings, so long as it remains unreversed, and that, too, regardless of the fact whether the decision was right or erroneous."

The court then proceeded to examine the pleadings and found that the homestead estate was fairly in issue in the foreclosure proceedings, and so held the decree conclusive against the exemption claimed,

notwithstanding there was no express finding in the decree against ti.

Patterson v. Wallace, 47 Ga. 452, where, upon application of a debtor to the ordinary to have a homestead set apart, a creditor resisted on the ground that his debt was contracted before June, 1865: *Held* that, upon a subsequent trial of the question of illegality of a levy upon the homestead property, the finding of the ordinary that it was not so contracted was *res judicata*.

The court said that, by the law of Georgia, the creditor was not bound to contest the application to have the homestead set apart, and if he had not done so the order of the ordinary setting it apart would not have prevented him from establishing his right to have it levied on by showing that his debt was contracted prior to June, 1865, but having contested the application he was bound by the finding.

To the same effect:

Harris v. Colquit, 44 Ga. 663.

In Corpening v. Kincaid, 82 N. C. 202, Dillard J.:

"It is an elementary principle, needing no citation of authority, that the judgment of a court of competent jurisdiction is conclusive as to everything passed upon and adjudged therein, and gives the right to have process to execute the same. * * * To allow the defendant now to claim his homestead in the lands which were adjudged to be affected by a specific lien anterior to the adoption of the constitution giving the exemptions, is collaterally to impeach the judgment of the court ordering the sale of the lands."

Hemenway v. Wood, 43 Iowa, 21. In an action for divorce, a sum was awarded the wife as alimony which was made a charge, by the decree, upon certain described land of the husband. The alimony

not being paid, the land was sold under the decree and a sheriff's deed executed therefor. The purchaser having sued for the land, it was held that the husband could not set up as a defense to the suit that the land constituted his homestead and was not liable for the judgment, this question having been adjudicated in the divorce proceeding. Beck, C. J., said:

"Defendant ought to have set up his homestead in the action for divorce, in order to protect his right to the land, when the court was asked to declare the judgment a lien thereon. That was the proper proceeding to determine the question he raised in this case. Having failed to do so, the court will not give him another opportunity to litigate the questions that were settled by that decree."

Perkins v. Bragg, 29 Ind. 507, holds that whether property attached is, or is not exempt from execution is *res judicata* after judgment in attachment.

Rector v. Ratton, 3 Neb. 178, holds, that it is too late after a decree of foreclosure of a mortgage to set up a claim for homestead.

To same effect:

Slaughter v. Detiney, 15 Ind. 49.
Oleson v. Bullard, 40 Iowa, 9.

The foregoing, and numberless other cases that might be cited, show that the courts have not hesitated to apply the settled doctrines, as to the effect of a former judgment to cases where exemptions are claimed; and that while it is true, as stated by Judge McCrary in his opinion, that "it is often necessary to look behind the judgment, and into the contract upon which it was rendered," this is allowed only where the record is silent, and the contract is invoked to supply the omission, and not where, as in this case, it is full

and explicit, and the contract is appealed to for the purpose of contradicting, and collaterally overthrowing it.

6. As authority for the position that we may look behind the record into the bond, Judge McCrary cites Ralls Co. Ct. v. The U. S., 105, U. S. 783. Examination of the record of that case in the clerk's office of this court will show, that the bond was set out *in haec verba* in the petition on which plaintiff obtained his judgment. To look at the bond, therefore, was to look into the record, and not behind it. The case, therefore, does not sustain the position taken by the learned judge, but rather the reverse.

7. Finally, after declaring that the court may look behind the judgment into the bond, Judge McCrary says that, for the purposes of this application, he will treat the bond as a part of the record. This seems to be an abandonment of the former position, and is apparently an admission that it is untenable; for what need to look outside of the record if the bond is a part of it?

This new position is quite as untenable as the first. According to the common law practice, the bond was a mere instrument of evidence, and could be imported into the record only by means of a bill of exceptions. According to the code practice of Missouri, as construed by our State Supreme Court in numerous decisions, it occupies no higher position.

Bowling v. McFarland, 38 Mo. 465.
Curry v. Lackey, 35 Mo. 392.
Deitz v. Corwin, 35 Mo. 376.
Baker v. Berry, 37 Mo. 306.
Phillips v. Evans, 64 Mo. 17.
Kern v. Ins. Co. 40 Mo. 19.
Hadwin v. Ins. Co. 13 Mo. 473.

Even the opinion of the court, though required by law to be filed among the papers in the case, constitutes no part of the record.

Rector v. Ashley, 6 Wall. 142.

IV.

The court below erred in instructing the jury that the second issue before them was: "Was the subscription to stock in the railroad company actually made, not as recited in said bonds, under the charter of the Missouri & Mississippi Railroad Company, but under the general law, whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people. In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence." And further erred in instructing them "that, to overcome the recitals in the bonds issued by the County Court under its seal, the evidence must be clear and positive, full and explicit, and that the burden of proving the alleged mistake, so as to overthrow said recitals, is upon the relator in this case; and the court further instructs the jury that the evidence to overcome said recitals is insufficient."

1. Because the instruction misinterprets the recital.

It assumes that the recital means that the bonds were issued under the charter and without a vote of the people, and, therefore, necessarily conflicts with the evidence tending to show that they were issued under the general law and in pursuance of such vote. The recital does not necessarily have this meaning. It is as follows: "This bond being issued under and

pursuant to orders of the County Court of Knox county, for subscription to the stock of the Missouri & Mississippi Railroad Company, as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865." The clause "as authorized by an act," etc., may fairly be understood as referring only to the railroad company, and not to the act of subscription. In other words, the recital may be taken as if it read: "This bond being issued * * * for subscription to the stock of the Missouri & Mississippi Railroad Company, a company authorized by an act," etc. So read, the bond would stand without any recital as to the authority for its issue, and that would have to be determined *aliunde*. The record shows that, before making the subscription, the court had taken all the steps requisite to authorize a subscription under the general law, and after making it they proceeded for years to levy taxes as if it had been made under the general law. The order of subscription itself is silent as to the law under which it was made. On the principal *ut res magis valeat quam pereat*, the language of the bond ought, if possible, to be so construed as to harmonize all the acts of the court.

Commissioners v. January, 94 U. S. 202.

The reading suggested would have that effect, would relieve the case of all contradictions, and being an entirely fair one, ought to be adopted.

Humboldt Township v. Long, 92 U. S. 642.

2. Because the issue submitted is not the true issue in the case, and the rule of evidence applied is not the one applicable to the case.

These two errors grow out of the same miscon-

ception, are closely allied to each other, and can best be treated together.

The jury were told that the question to be considered was, whether the recital found in the bond was or was not put there by mistake or inadvertence. They should have been told that the question was whether the County Court, in making the subscription, proceeded under the general law and in pursuance of a vote of the people, or under the charter and without a vote. This was the real question and was one of fact to be determined from all the evidence bearing upon the acts and conduct of the parties.

Mastin v. The Pacific R. R. Co., 83 Mo. 634.

The requirement that the relator should overcome the recital in the bonds by evidence "clear and positive, full and explicit," was an entire disregard of the real attitude of the case. It was an application of the rule laid down by the courts of chancery in suits brought to reform written instruments on the ground of alleged mistake. This suit was not technically one of that sort, nor was it substantially.

The leading reason given for the rule is, that the law presumes, with almost conclusive force, that what the parties have in writing stated to be their contract is their contract; hence, to show that it is not, requires more than a mere preponderance of evidence. In the present case we have, growing out of the judgment by default, what is at the very least a countervailing presumption of at least equal strength. That judgment we have already endeavored to show, and as we believe have shown, is conclusive of the essential fact in this case. But if not conclusive, it at least establishes a strong legal presumption. As a general proposition it must be true that, when a defendant suffers judgment upon specific allegations as to what his contract is, he

thereby admits it to be as alleged. When one is duly served with a writ charging in plain terms that he has made a particular contract, and he fails to defend, so that judgment goes against him, and after judgment makes no effort during the term to have it set aside, or after the term, by allegations of fraud, imposition or concealment to enjoin its enforcement, what other conclusion can we draw? Is it reasonable to say that all this shall go for naught when the true nature of the contract comes to be investigated? These facts afford at least as strong ground of presumption as do the signing and sealing of a written instrument. Men are not given to allowing themselves to be condemned on false charges, any more than they are to signing papers that do not embody their contracts. Indeed, they are more apt to do the latter than the former, for contracts are often hastily drawn and improvidently executed, but the law allows no judgment to be entered except upon full notice and after ample opportunity to reflect and decide upon a course of action. Contracts, too, are often entered into without the benefit of competent legal advice, but it is seldom a man is sued that he does not consult counsel. Whilst, therefore, there may be in this case a legal presumption that these were non-voted bonds, growing out of the recital, there is at least as strong a presumption to the contrary, growing out of the judgment. The two presumptions off-set each other, the reason for the chancery rule fails, and the rule becomes inapplicable.

Even if the relator's bonds were not now merged in his judgment, the rule would not be applicable. As stated in some of the cases, it is founded on "the strong presumption arising from the signatures and seals of the parties."

Stockbridge I. Co. v. Hudson I. Co. 102 Mass. 49.

Fowler v. Fowler, 4 De G. & J. 264.

This means the concurring act of the parties in executing the same instrument. The bonds in question are not the act of the relator. They have not his signature or seal attached. The recitals in them are not his act, and are not binding on him. He is at liberty to contradict them, and need not resort to a bill in equity or any equivalent proceeding to get rid of them, or avoid their effect. In one case a misrecital in the bonds has been thus briefly disposed of: "It is true they refer to the wrong statute, but *falsa demonstratio non vocet.*"

Commissioners v. January, 94 U. S. 202.

In none has it been intimated that a chancery proceeding was necessary, or the chancery rule of evidence applicable.

The Civil Rights Cases, 109 U. S. 60.
Smith v. Clark County, 54 Mo. 71.
Chouteau v. Allen, 70 Mo. 326-7.

Again, there is in the books a class of cases where the contract as finally drawn is at variance with the proposals or other earlier papers. In these it is said, that as the parties are always at liberty to change their minds until the contract is concluded, the presumption is that they did change, and this is given as an additional reason for the rule of "clear and positive, full and explicit" evidence.

Kerr on Fraud and Mistake, 422.
Marquis of Breadalbane v. Chandos, 2 M. & C. 740.

This reason, like the others, fails in this case, because, no bonds could be issued except in pursuance of a subscription already made. The County

Court could not, after subscribing under the general law, change its mind and issue bonds under the charter.

For these reasons, we submit that the court, instead of constituting this recital a bulwark of defense to the respondents, and requiring the relator to overthrow it under a stringent rule of evidence, should have given the recital a position which, at most, it is entitled to, as one of the facts in the case to be considered by the jury.

3. Because, upon the facts as shown in evidence, the relator was entitled to judgment.

The facts are briefly these:

In February, 1867, citizens of Knox county presented a petition to the County Court, asking the court to submit to the qualified voters of the county, the question of authorizing the court to subscribe $100,000 to some railroad to be built through the county. The court made the order, as prayed, fixing March 12, 1867, as the day for holding the election, providing that the subscription, if made, should be paid in bonds of the county, bearing 7 per cent. interest, and running ten years, and describing the company to be subscribed to as follows: "A railroad company which may construct a railroad running from West Quincy, in this State, thence west through Knox county, to some point on the Missouri river, or in a company which may construct a railroad running from Alexandria in this State, southwest through Knox county, to intersect the North Missouri Railroad at, or near Macon City, or in any other railroad company, which may duly organize, etc."

On the 4th day of March, 1867, this order was changed so as to require Edina to be a point upon any

road to be subscribed to. On the 12th of March the election was held as ordered, the result being 510 votes in favor of subscribing and 98 votes against. This result was duly ascertained and certified by the proper officers. The County Court did not meet after the election till the regular May term. At that term the court entered an order subscribing $100,000 to the capital stock of the Missouri & Mississippi Railway Company, but not referring to the vote of the people or to any law as authorizing the subscription. Three days after this the court entered an order levying a tax of twenty-five cents on the $100 to pay interest to accrue on the bonds to be issued to pay this subscription. At the May term in each of the succeeding years, 1868, 1869, 1870, 1871, 1872, 1873 and 1874, the court made like levies. The taxable wealth of the county during this period was about $4,000,000.

From time to time, during the years 1868 and 1869, the County Court issued to the Missouri & Mississippi Railroad Company, in payment of the above subscription, its bonds of the denomination of $500, dated February 1, 1868, bearing 7 per cent. interest, and running ten years.

Fifty-eight of these bonds, with the February, 1878, coupon on them, are embraced in relator's judgment.

The taxes levied, as above stated, were paid by the people the same as other taxes, and the proceeds were used to pay interest on the bonds so issued. Up to May, 1874, all coupons were paid as presented to the treasurer. Each of these bonds contains the following recital:

"This bond, being issued under and pursuant to orders of the County Court of Knox county, for sub-

scription to the stock of the Missouri & Mississippi Railroad Company as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865."

On the 12th of March, 1867, the Missouri & Mississippi Railroad Company was a corporation organized and existing under the act recited, and was contemplating the construction of a railroad from Macon, Mo., through Edina, in the direction of Keokuk, Iowa, or Alexandria, Mo.

On the 13th of May, 1867, the board of directors of this company appointed a committee, consisting of its president, A. L. Gilstrap, a citizen of Macon, and two others, to draw up forms for the use of the company, including forms of bonds to be issued by the counties in aid of the company. In pursuance of this resolution, Gilstrap drew up a form of bond containing the recital above set forth. In his own county of Macon, the County Court, in the spring of 1867, made a subscription without taking a vote of the people. This form was used in the issue of the Macon county bonds, and was afterward sent to Knox county and used by the authorities of that county in the issue of the bonds here in question. This subscription by Macon county gave rise to the case of The State *ex rel.* v. Macon County Court, 41 Mo. 454, which was decided October 25, 1867. Until this date, it was not judicially determined that a subscription could be made under the charter of the Missouri & Mississippi Railroad Company.

Wm. F. Plumer was one of the judges of the Knox County Court in 1867, and as such participated in making the subscription in question and issuing the bonds. He testified that the court would not have

made the subscription or issued the bonds had it not been for the vote; that the court were asked to do it without a vote but refused; that the court considered that they were carrying out the will of the people as expressed at the election of March 12, and were acting under the general law which required a vote to be taken; that he did not understand the recital in the bonds, as asserting anything the contrary of this, and did not mean, when consenting to the use of this recital, to assert thereby that in making the subscription and issuing the bonds the court proceeded of its own motion, under authority given by the charter, and without reference to the vote; nor did he believe that the other members of the court, or the court as a body, intended so to assert; that the members of the court consulted together fully and were of one mind in the matter.

On the 3d of March, 1881, Harshman filed his petition in this court, setting forth that the subscription to pay which his bonds were issued, "was authorized by a vote of the people of said county at a special election held pursuant to an order of the County Court of said county on the 12th of March, 1867, under the seventeenth section of Chapter 63, of the General Statutes of Missouri, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription."

A summons was issued and served on the county, and default being made, on the 28th of March, 1881, final judgment was rendered. This judgment runs as follows: "And this action being founded upon certain bonds and coupons for interest thereon, issued by said defendant *and described in the petition*, the court finds that plaintiff has sustained damage by reason of the non-payment thereof in the sum, etc. It is therefore

considered that plaintiff recover * * * the damages aforesaid by the court assessed."

Upon this evidence the jury would have been well warranted in finding that at least the fifty-eight bonds, dated Feb. 1, 1868, were issued under the general law. All the steps requisite to authorize a subscription under that law were duly taken, and the necessary two-thirds majority of the voters was obtained.

It is true the Missouri & Mississippi Railroad Company was not named in the proposal to subscribe, but it was described, viz: A company to build a road from Alexandria, *via* Edina, to Macon City, the route over which the Missouri & Mississippi Company was chartered to build. This was sufficient.

Commissioners v. Thayer, 94 U. S. 631.
Scipio v. Wright, 101 U. S. 665.

Having thus obtained the requisite authority to proceed under the general law, at the next term the County Court did make a subscription. The order is silent as to the vote and the powers conferred by the general law, and equally silent as to the charter power. Except that it is natural to refer the subscription to the antecedent steps taken to authorize one, it might be said that the order is ambiguous. If ambiguous, it may be explained or its true character ascertained by parol evidence.

Emory v. Joice, 70 Mo. 537.
Johnson County v. Lowe, 72 Mo. 637.
Joerdens v. Schrimpf, 77 Mo. 383.

But, if it was ambiguous at the outset, the court did not long leave it so. Three days after making it, the court levied a tax, to pay interest, of twenty-five cents on the $100, just five times what it was authorized to levy if it was proceeding under the charter.

As a cotemporary act, irrevocably characterizing the subscription, this is decisive. A declaration in the order of subscription that it was made under the general law would have been conclusive. So would such a declaration in a supplementary order made three days later. How, then, can we deny that effect to an act which implies all that such a declaration would express?

It can not be doubted, that if a tax-payer had resisted the collection of this tax on the ground that it exceeded the charter limit, any court would have held that the subscription was made and the tax levied under the general law and not under the charter.

If that was so in 1867, why is it not so in 1887? And if a tax-payer could not resist such a levy, voluntarily made, why can not a creditor compel the making of one?

It will be said that the bonds recite the charter power. Grant it. They were issued in 1868 and 1869, long after the court, by an unequivocal act, had removed any ambiguity in the order of subscription. The subsequent declaration could not undo what had thus become fixed.

It may be admitted that, if nothing had intervened between the making of the subscription and the issuing of the bonds, the insertion of an unambiguous recital in the bonds would have determined the character of the subscription; but it does not follow, that when that has once been fixed the court could, by a recital in the bonds, change it. It must be remembered that the subscription is the basis of the issue of bonds. If that is made in pursuance of a particular statute power, the bonds are necessarily issued in pursuance of the same. The idea that the court, after subscribing under the general law, can issue bonds

under the charter to pay the subscription, is a contradiction in terms.

If the fifty-eight bonds, dated February 1, 1868, were alone issued under the vote, so much of the judgment as is founded on them and their coupons is entitled to a full levy. It is no objection that that would require a splitting of the judgment into two parts, and a different levy for each part. It has been the common practice in the districts of Missouri, and we believe elsewhere, upon application for a levy to pay an entire judgment, to order a levy to pay a portion of it.

How much of this judgment is founded on these fifty-eight bonds and their coupons is, of course, mere matter of arithmetic, and the computation might, under the order of the court, be made by the clerk or a commissioner.

As to the sixty bonds, dated February 1, 1870, the evidence shows that interest was regularly paid on them up to May, 1874, out of taxes annually levied and paid by the people for that purpose.

This makes the principle of estoppel fairly applicable. By acquiescing for so long in taxation at a rate sufficient to pay the entire interest as it accrued, the tax-payers led purchasers to suppose that taxation at that rate was justified by law, and ought not now to be allowed to show that it is not.

Upon the whole we submit that the judgment should be reversed and remanded, and if this court is of opinion that the judgment of March 28, 1881, is conclusive that the bonds were issued under the general law, then the Circuit Court should be directed to grant its peremptory writ of *mandamus*, as prayed by relator, for the full amount of the judgment.

T. K. SKINKER,
Of Counsel for Relator.

IN THE

Supreme Court OF THE United States.

OCTOBER TERM, 1886.

THE UNITED STATES *ex rel.* GEORGE W. HARSHMAN,

Plaintiff in Error,

vs.

THE COUNTY COURT OF KNOX COUNTY, ET AL.,

Defendants in Error.

No. 258.

ARGUMENT FOR PLAINTIFF IN ERROR.

By J. B. HENDERSON,
Attorney For Plaintiff.

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vs.

THE COUNTY COURT OF KNOX COUNTY AND THE JUSTICES THEREOF,

Defendants in Error.

No. 258.

The statement of the facts in this case, made by T. K. Skinker, Esq., of counsel for defendant in error, and to be found in his brief, is sufficently specific. Upon that statement, supported as it is by the record, I proceed to submit a short argument to show that the judgment of the Circuit Court ought to be reversed.

ARGUMENT.

In 1853, the Missouri Legislature passed the first general law providing for the formation of railroad companies. Previous to that time all such companies had been authorized by special acts. (Session Acts 1852–3 p. 121.) From the adoption of this general

law (February 24, 1853) to July 4, 1865, numerous railroad companies were organized in the State, both under this general act and by special acts of the legislature. A new constitution, adopted on July 4, 1865, prohibited all further special acts for that purpose, and thereafter all such companies were required to be organized under general laws only.

Sections 29 and 30 of this general railroad law of 1853 (p. 135–6) made it lawful for the County Court of any county and the city council of any city in the State, to subscribe to the capital stock of any railroad company, organized either under this general law or under any special law of the State; and in case of subscription, the authorities could issue bonds or levy taxes to pay such subscription, and if bonds were issued authority was given to levy taxes to pay the same. Under this first act the municipal authorities were fully empowered to subscribe stock and issue bonds without any vote of the people whatever, but the twenty-ninth section thereof authorized such authorities "for information" to "cause an election to be held to ascertain the sense of the tax payers of such county or city as to such subscription," &c.

This law was retained in *eadem verba* in the revision of 1855.

On January 14, 1860, and before the said constitution was adopted, the legislature changed the words, "may for information," into "shall for information" (Session Acts, 1859–60, p. 80), and on March 23, 1861, another amendment to the law was passed, making it the duty of such authorities to submit the question of subscription to a vote of "the resident voters," and if a majority voted in favor of it, then the authorities "shall subscribe," etc., and this act further declared that "it shall *not be lawful* for the

County Court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters," etc. (Session Acts, 1860–1, p. 60.)

In this condition the law remained till the adoption of a new constitution, on July 4, 1865, which provided that "the General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto."

Art. 2, Sec. 14, Constitution of 1865, 1 Wagner, p. 62.

Immediately after the adoption of this constitution a revision of the laws was made, conforming the statutes thereto, and accordingly the seventeenth section of the general railroad laws of 1865 was so framed as to authorize the subscription of stock "to any railroad company duly organized under this or any other law of the State, *provided* that *two-thirds* of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." And the eighteenth section provided for the issue of bonds and the levy of a sufficient tax to pay the same.

See 1 Wagner Stat. p. 305.

It may be safely stated that, after the passage of the act of March 23, 1861, absolutely prohibiting the issue of the bonds except upon a vote of the people, no railroad subscription was ever made by any municipality in the State, without such vote, to any company whose charter was adopted subsequently to that date, whether the company was organized under general or special act.

The old case of Alexander v. The City of St. Louis, 23 Mo. 483, had decided merely that a subsequent general prohibition in the St. Louis city charter was not inconsistent with, nor did it repeal the provisions of a previous special act of the legislature, authorizing the city to subscribe for stock in the Ohio & Mississippi Railroad Company. The positive denial of all authority to the County Courts to issue bonds under this act of 1861, to any company whether organized under the general law or by special act, was universally supposed to apply to all railroad corporations created subsequent to its passage, unless the legislature should specially provide therein for subscription without a vote.

On February 20, 1865, only a few months before the adoption of the State Constitution referred to, the legislature had passed the act to charter "The Missouri & Mississippi Railroad Company," the same company to which the subscription in this case was made. It is true that the thirteenth section of this charter authorized any County Court to subscribe stock and issue bonds therefor, and to levy a tax to pay *the same*, not exceeding one-twentieth of one per cent., etc. But there was no special exemption from the act of 1861. On the adoption of the constitution July 14, 1865, and the revision of the law thereunder, the act of March 23, 1861, was superseded and repealed. The charter of the Missouri & Mississippi Railroad Company then antedated the constitution and the law passed in pursuance thereof. And now, for the first time, it was argued in consonance with the Alexander case, that the older was not affected by the later law.

The Macon County Court was now induced to ubscribe stock to this company, with a view only of

testing the constitutionality of a subscription to a previous charter without taking a vote of the people. The court, therefore, made the subscription and, refusing to issue the bonds, a proceeding by *mandamus* was instituted to test the question. The Supreme Court of Missouri simply decided that the constitution had no "retro-active effect on statutes passed before its adoption," and thereupon ordered the bonds to be issued. Without such an opinion the bonds could not have been sold.

See State v. Macon County Court, 41 Mo. 453.

This ruling was followed in later years by numerous cases in the Supreme Court of Missouri, and was accepted by this court as the settled law of that State.

County of Callaway v. Foster, 93 U. S. 570.
County of Scotland v. Thomas, 94 U. S. 688.
County of Henry v. Nicolay, 95 U. S. 619.
County of Ray v. Vansycle, 96 U. S. 675.
County of Ralls v. Douglas, 105 U. S. 728, and other cases cited.

This Macon County case was not decided until the October Term of the Supreme Court of Missouri in 1867. The Knox county subscription for $100,000 was made long previous to this decision, to-wit: on May 13, 1867, and not till after an election had been held on March 12, 1867, in pursuance of an order of the County Court made for that purpose on the 6th of February previous. The presiding justice of the County Court who ordered the election, who made the subscription and who signed the bonds, was a witness in this case, and he says positively that the first subscription of $100,000 was

made "under a vote of the people of that county at an election prior to that time;" that this subscription was made "to carry out that vote." He says, further, that the court "would not have taken the responsibility" at that time of subscribing and issuing bonds "without a vote of the people." (Rec., pp. 34-5-6.)

It is true that, in a short time after this subscription of the first $100,000, the Macon county case was published, and thereafter, in 1870, two other subscriptions were made without a vote of the people—these additional subscriptions being necessary to complete the grade of the road in Knox county.

It is, therefore, an established fact in this case that, before the promulgation of the Macon case, the County Court of Knox county believed that it had no power to subscribe to the stock of this company, unless authorized by a vote of the people. It is an established fact that before the court subscribed the stock such a vote *was* taken, and more than two-thirds of the qualified voters of the county authorized the court to subscribe the $100,000. It is also certain that the subscription afterwards made was in perfect conformity to the previous order of the court on which the people had voted. These facts are established beyond doubt, but on the trial of the case below, the court held that the recital in the bond that it was issued "under and pursuant to order of the County Court of Knox county for subscription to the stock of the Missouri & Mississippi Railroad Company, as authorized by an act of the General Assembly of the State of Missouri, entitled 'an act to incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865," was incompatible with the idea that it could have been authorized by a vote of the people. Suppose that the bond had, in addition to words above quoted, con-

tained a further recital as follows, *to-wit:* "and authorized by a vote of the people," would there be any contradiction or incongruity between such recitals? In my judgment such recitals would not only have been consistent with each other, but, if used, would have given full expression to the law and the facts in the case. It would have carried out the instention of the County Court and the people of the county, and would have unquestionably made the bond what it is now claimed to be by the plaintiff. If a vote had been recited in the bond, would not such recital have worked an *estoppel* against the county as to that fact?

The bonds to be valid at all must have been authorized by the provisions of some railroad charter—some charter created under general or special law. In this case, it is perfectly certain that the only authority to issue the bond is to be found in the act to incorporate the Missouri & Mississippi Railroad Company, approved February 20, 1865. The recital of the bond in that respect is absolutely true. That charter gives the only authority for the existence of the bond. Take away this act and the bond falls as absolutely worthless. It is a total misapprehension of the meaning of the seventeenth section of the general railroad law of 1865, to suppose that the power to issue bonds is derived from it alone. There must be a railroad company in existence organized under State law, authorized to receive the bonds. This seventeenth section (1 Wagner, 305), provides that county courts may subscribe stock on the condition of a two-thirds vote of the people to *any* railroad company, whether organized under the general law or by special act. In taking the vote it was customary, of course, to name some company, and, I admit, that when some particular company was designated in the order of election, a recital in the bonds when issued, that they were

authorized by the seventeenth section of the general railroad law, would be sufficient to make the bond good. But it becomes good only by virtue of the fact that there is or was truly a railroad company in existence, authorized to receive the bonds as such. That is certain in the law which may be made certain. If a bond should show that it is issued under the seventeenth section, two implications would necessarily follow: *First*, that some railroad company, organized under some sort of State law, was in existence with authority to receive the subscription; and *second*, that the bonds had been authorized by the necessary vote of the people. By examining the order of election, or the order to issue the bonds, we might find the company named, or sufficiently described to which the subscription was to be made. When we have ascertained the company, the next inquiry is, necessarily, is this company authorized to receive the subscription? Instead of a railroad company, it may turn out to be a manufacturing company, or possibly a railroad company not organized or created by Missouri law. If so, the vote of the people does not make the bond valid. At last, then, the *authority* to issue the bond comes, *not* from the vote of the people, but from the act of incorporation of the company to which the subscription is to be made and to which the bonds are to be issued.

In this case, the authority to issue the bond resides in the Missouri & Mississippi charter passed by the legislature, Feburary 20, 1865. If the people voted for the issue, the only consequence or effect produced thereby, is to provide other and greater means for the payment of the bonds. If there *was* a vote, then the levy must be for enough to pay the bonds in full, for such is the requirements of the eighteenth section of the

general law, touching bonds issued to pay subscriptions authorized under a vote of the people.

Whether there was a vote or not in this case, it is certain that the legal authority to issue the bond is to be found in the charter of the Missouri & Mississippi csmpany. The recital to that effect is true, and I am at a loss to understand how a recital of one truth can be inconsistent with another truth existing in the case. Lawyers and judges are constantly urging that all truth is consistent, and if it be true, as it may be under the law, that these bonds were issued to the Missouri & Mississippi Railroad Company after being authorized by a vote of the people, then the rulings of the court below are erroneous, and ought to be corrected.

The court instructed the jury (see Rec., p. 25) that an election was held in Knox county to authorize the issue of bonds to the extent of $100,000, and that this fact was conclusively established by the records. He next instructed them, in substance, that the authority to subscribe under the charter was incompatible with the authority to subscribe under the seventeenth section of the general law, and that before plaintiff could succeed he must show that the recital in the bond stating that it was issued under the Missouri & Mississippi charter is a mistake; and not satisfied with these abundant errors, the jury is directed that the burden of showing the falsehood of the recital was on the plaintiff, and further that the evidence offered to *overcome* the recitals was insufficient, and, therefore, they must find for the county. In other words, the plaintiff showed by the records that there was a vote, that the Missouri & Mississippi company filled all the requirements of that vote, and showed by oral testimony that the court acted on said vote in issuing the bonds, yet the court charged the

jury that before plaintiff could recover at all, he must prove himself out of court. If the bonds were not issued under the special act—the Missouri & Mississippi charter—then they had no authority for their issue at all. If without authority the plaintiff had no case, and it seems paradoxical to say that before he can recover he must show that he has no cause of action. The mistake is not in the issue or recital of the bonds. it is in the erroneous views of the court.

The only fault I find with the County Court of Knox county is that in issuing the bond it failed to recite the whole case. The recital, so far as made is true, and that recital is perfectly consistent with the fact that it was authorized by a vote of the people. The real question for the court below was this: Can the plaintiff, in the absence of recital in the bonds themselves, show by evidence that they were in fact issued by authority of a vote? The judgment record in favor of plaintiff, charging that fact, if not conclusive of itself, at least places the burden of proving the contrary on the respondent.

It is my opinion that the judgment record is conclusive; that the respondent having personal service of the writ and petition alleging a vote, is now estopped from asserting the contrary. Such an *estoppel* is as reasonable and valid as if recited in the bond itself. If such recital had been made in the bond it would have been conclusive. Such recital is now made by the judgment record of the court, and this record recital is supported by the evidence and is consistent with the other recitals in the bonds.

This view of the case is strengthened by the facts existing when the County Court made the order of election in February, 1867. Two projects of railroad improvement were before the people of Knox county—one

was a line of road beginning at West Quincy, in Marion county, Mo., and running almost due west through Knox county. This was the Quincy, Missiouri & Pacific Company. The other was the road contemplated by the Missouri & Mississippi Company, beginning at Alexandria, Mo., near Keokuk, Iowa, and running thence to Macon City, Mo., and passing through Knox county in a northeast and southwest direction.

The order of election did not designate by name either company, but set forth both routes, leaving the County Court to select the company giving the best hope of success. This was a justifiable proceeding, as established by the Supreme Court of Missouri, no less than by this court in numerous decisions.

See Ramsey v. Baeder, 50 Mo. 600.
Commissioners v. Thayer, 94 U. S. 631.
Scipio v. Wright, 101 U. S. 665, and other cases.

In all such cases, the discretion of the court is to be exercised in selecting some company having chartered privileges, filling the requirements of the vote.

Whether the company selected be such a company or not, is a question to be settled by the record and by other evidence in the case. The court in this case having selected the Missouri & Mississippi Company, made the subscription to that company in almost the precise words of the order upon which the people had voted. Having subscribed to that company, it was natural that in the issue of the bonds, the county authorities should have stated that they were issued by virtue or by authority of a subscription to that company.

The recital is true, and although this court and

the Missouri courts have again and again given new emphasis in their decisions to the legal maxim, that "a false recital worketh no harm" (*falsa demonstratio non nocet*), yet, in this case, we experience defeat because of a recital, which is not only true but consistent with all other facts in the case, and necessary for our recovery.

The only thing needed in the bond to establish by *estoppel* all we claim in this case, is the additional recital that it was authorized by a vote of the people. In the absence of such written recital, can the fact be shown *aliunde*, either by record or by oral evidence.

I assert that, if this bond had been issued without any recital whatever of authority therefor, the authority could well be shown by evidence outside of the bond itself. Whether the bond was issued with a false recital or with no recital at all, is immaterial to the holder if he can show that the court possessed power to issue it at all.

Smith v Clark Co., 54 Mo. 71.
Flagg v. City of Palmyra, 36 Mo. 440.

If he can show *aliunde* authority for its issue, why can he not show as the plaintiff did in this case, that it was authorized by a vote of the people?

Injustice has been done in this case, and the numuerous errors should be promptly remedied, either by ordering the proper judgment here or remanding it to the lower court with instructions as to the law.

J. B. HENDERSON,
For Appellant.

122-206

MAY 2 1887

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1886.

THE UNITED STATES, EX REL.
GEORGE W. HARSHMAN,
Plaintiff in Error.
vs.
THE COUNTY COURT OF KNOX CO., AND THE JUSTICES THEREOF.

No. 258.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

JAMES CARR AND
GEO. D. REYNOLDS, OF COUNSEL
For Defendants in Error.

Daily Printing Co., 217 Olive Street, St Louis

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Smith v Clark Co., 54 Mo. 71.
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If he can show *aliunde* authority for its issue, why can he not show as the plaintiff did in this case, that it was authorized by a vote of the people?

Injustice has been done in this case, and the numuerous errors should be promptly remedied, either by ordering the proper judgment here or remanding it to the lower court with instructions as to the law.

J. B. HENDERSON,
For Appellant.

122-306

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1886.

THE UNITED STATES, EX REL.
GEORGE W. HARSHMAN,
Plaintiff in Error.
vs.
THE COUNTY COURT OF KNOX CO., AND THE JUSTICES THEREOF.

No. 258.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

JAMES CARR AND
GEO. D. REYNOLDS, OF COUNSEL
For Defendants in Error.

Daly Printing Co., 217 Olive Street, St. Louis

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MISSOURI.

THE UNITED STATES, EX REL. GEORGE W. HARSHMAN,
Plaintiff in Error.
vs.
THE COUNTY COURT OF KNOX CO., AND THE JUSTICES THEREOF.

No. 258.

On the 5th day of January, 1882, the relator filed an information in the court below in which he alleged that on the 28th day of March, 1881, he had recovered judgment in said court against Knox county, Mo., for the sum of $77,374.46, upon bonds and coupons issued by said county in part payment of a subscription made by said county on the 9th day of June, 1867, to the capital stock of the Missouri and Mississippi Railroad Co. That said subscription was

authorized by a vote of the people of said county at a special election held pursuant to an order of the County Court of said county, on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; and, after making the usual technical allegations, the relator prayed for an alternative writ of mandamus, commanding the defendant in error, the County Court of Knox county, forthwith to levy a special tax upon all property in Knox county made taxable by law for county purposes, and to cause the same to be collected in money, and when collected to be applied in payment of said said judgment.

An alternative writ of mandamus was issued on the 25th day of January, 1882, commanding the defendant in error to levy said special tax, or that it show cause before said Court on the first day of the next March term, the 20th day of March, 1882, why it refused to do so.

In obedience to said writ, on the 23d day of March, 1882, the defendant in error made and filed the following return thereto, viz.:

Now at this day come the respondents, the judges of the County Court of Knox county, Mo., and for return to the alternative writ of mandamus issued in the above entitled cause, or so much thereof as they are advised that it is material for them to answer, admit that on the 28th day of March, 1881, George W. Harshman, the relator, recovered judgment by default against the County of Knox, in the State

of Missouri, for the sum of $77,374.46; that $67,843.92 thereof bears interest at the rate of 7 per cent. per annum, and the remainder of said judgment, viz., the sum of $9,530.-54, bears interest at the rate of 6 per cent. per annum, together with costs, taxed at $112.75.

That said judgment was receovered upon bonds and coupons issued by said County of Knox in part payment of two subscriptions made by said county to the capital stock of the Missouri and Mississippi Railroad Co., as hereinafter stated. But respondents expressly deny that said subscriptions, or either of them, were authorized by a vote of the people of said county, at either a general or special election held pursuant to an order of the County Court of said county, on the 12th day of March, 1867, or at another time under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force. They deny that any special election pursuant to an order of the County Court of said county, on the 12th day of March, 1867, or at any other time, was ever held under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, for the purpose of authorizing the County Court of Knox county to subscribe to the capital stock of the Missouri and Mississippi Railroad Co. They deny that two-thirds of the qualified voters of Knox county ever voted in favor of or assented to the making of any subscription to the capital stock of the Missouri and Mississippi Railroad Co. Respondents admit that relator requested them, as the County Court of Knox county, to levy a special tax upon all property in said county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested

in business in said county, and to cause said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment.

That respondents have refused to levy said tax, and that the said county has no property out of which said judgment can be levied, and it has no money out of which said judgment can be paid, except the fund derived from the levy and collection of a special tax of 1-20 of 1 per cent. under the charter of the Missouri and Mississippi Railroad Co., as hereinafter stated.

Respondents, for further return to said alternative writ of mandamus, state that under and by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Co.," approved February 20, 1865, the corporators therein named on the — day of September, 1866, organized under and accepted the provisions of said act, and thereby became a body politic and corporate under the name of the "Missouri and Mississippi Railroad Company."

That in and by said act said Missouri and Mississippi Railroad Co. was authorized to locate and build a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon in a southwesterly direction to the Missouri river. That at the time of said county of Knox making said subscriptions and issuing the bonds with the interest coupons to the Missouri

and Mississippi Railroad Co., as hereinafter stated, the County Court of Knox county, under the Constitution and General Statutes of Missouri, had no authority to make said subscriptions, or either of them, and issue said bonds and coupons without the assent of two-thirds of the qualified voters of said county of Knox, given at a regular or special election held in said county for the purpose of obtaining said assent, except the authority which was conferred upon it by the 13th section of the charter of said Missouri and Mississippi Railroad Co, hereinbefore referred to, which is as follows:

"It shall be lawful for the corporate authorities of any city or town or county court, of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of 1 per cent. upon the assessed value of taxable property for each year."

That in and by *the authority conferred upon the County Court of Knox county by said section alone*, and by no other authority or power, the County Court of Knox county, on the 13th day of May, 1867, subscribed the sum of $100,000 on behalf of Knox county to the capital stock of the said Missouri and Mississippi Railroad Co., and issued bonds for the sums of $500 and $50 to the amount of said subscription in payment thereof. That fifty-eight of the bonds with coupons, upon which relator recovered said judgment, were dated the 1st day of February, 1868, and were of the denomination of $500 each, and had interest coupons attached for the interest, at the rate of 7 per cent. per annum, payable annually, and the bonds were payable ten years after date, at the National Bank of Commerce, in the city of New York.

That in and by the authority conferred upon the County Court of Knox county by said section of said charter alone, and no other authority or power, the County Court of Knox County, on the 2d day of May, 1870, subscribed the additional sum of $55,000 on behalf of Knox county to the capital stock of said Missouri and Mississippi Railroad Co., and issued bonds for the sums of $500 and $50 each to the amount of said subscription in payment thereof. That sixty of the bonds with coupons, upon which relator covered said judgment, were dated the 1st day of February, 1870, and were of the denomination of $500 each, and had interest coupons attached for the interest at the rate of 7 per cent. per annum, payable annually, and the bonds were payable ten years after date, at the National Bank of Commerce, in the city of New York.

That each of said subscriptions was made without the assent of two-thirds of the qualified voters of said county of Knox, no election regular or special having been held in said county for the purpose of obtaining said assent, but, on the contrary, each of said subscriptions was made by the County Court of Knox county against the wishes of two-thirds of the qualified voters of said county.

That said judgment in favor of relator was recovered on a portion of the bonds, with the interest coupons attached, issued by Knox county in payment of each of said subscriptions to said Missouri and Mississippi Railroad Co. by Knox county, as aforesaid, and *it is recited on the face of said bonds that they were issued under and pursuant to orders of the County Court of Knox county to the Missouri and Mississippi Railroad Co.,* for subscription to the capital stock of

said company, as authorized by "An act to incorporate the Missouri and Mississippi Railroad Co.," approved February 20, 1865, said *recital being the only one which shows the law and authority by and under which said bonds were issued.* The only part of said act which confers any authority on the County Court of Knox county to make said subscriptions and issue said bonds is the 13th section thereof, which is hereinbefore recited. That neither the County Court of Knox county nor any officer or agent thereof had any authority to make said subscriptions, or either of them, and issue said bonds, except the authority which is conferred on the County Court of Knox county by said 13th section of said act, and each of said subscriptions was made said debt contracted, and said bonds were issued by the county of Knox to said Missouri and Mississippi Railroad Co., as aforesaid, with express reference to payment only out of the money derived from the levy of a special tax of one-twentieth of 1 per cent. each year upon the assessed value of all the taxable property of Knox county, as authorized by the 13th section of the charter of the said Missouri and Mississippi Railroad Co., as hereinbefore recited.

That under and by authority of said section the County Court of Knox county has, each and every year since the issue of said bonds, as aforesaid, levied a special tax of one-twentieth of 1 per cent. upon the assessed value of all the taxable property in said county, and caused the same to be extended on the tax-books of said county for each year, and had said special tax collected for the purpose of paying said bonds and coupons.

That the aggregate valuation of all the taxable property of

Knox county is now and always has been less than $6,000,000; that in and by the 11th section of the 10th article of the constitution of the State of Missouri the power of the County Court of Knox (county) is limited to the following rate of taxation for county purposes, viz.:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

That at the time of making each of said subscriptions and issuing said bonds, as hereinbefore stated, the County Court of Knox county was, ever since has been, and still is, limited in levying taxes for county purposes by the 165th section of the 118th chapter of Wagner's Missouri Statutes, as follows:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property, and licenses made taxable by law for State purposes, but the county tax in no case shall exceed one-half of 1 per cent. on the taxable property."

That in and by authority of said section the County Court of Knox county has, each and every year, since the making of said subscriptions and issuing said bonds and coupons, as aforesaid, levied a tax of one-half of 1 per cent. upon all property and licenses made taxable by law for State purposes, for the purpose of annually defraying the expenses of carrying on and administering the government in Knox county.

That the money derived from the levy of said special tax of one-twentieth of 1 per cent. is inadequate to pay the bonds

and coupons as they mature and fall due, and the money derived from the levy of said annual tax of one-half of 1 per cent., although prudently administered and economically applied, is all annually consumed in defraying the expenses of administering the government in the county of Knox.

That Knox county has no money in its treasury with which it could pay the relator's judgment; that these respondents, as judges of the County Court of Knox county, have no legal authority to levy any other or greater taxes than the taxes as hereinbefore stated, and they say and aver that they have no legal authority or power to levy or cause to be collected a special tax upon all property in Knox county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and, when collected, to be applied in payment and discharge of said judgment, as commanded by the alternative writ of mandamus issued herein.

Respondents say that the Missouri and Mississippi Railroad Co. has never built any railroad through or into Knox county, and there is no prospect that it ever will, as it is hopelessly insolvent; and these respondents further say that the county of Knox has fully complied with and performed said contract between it and said Missouri and Mississippi Railroad Co., and the holders of its bonds, as aforesaid, including the relator, and they set up and plead the foregoing facts as the reasons why they refuse to levy a special tax upon all property in the county of Knox made taxable by law for county purposes, and to cause the said tax to be collected in money, and, when collected, to be applied in payment and discharge of said

judgment, as commanded by said alternative writ of mandamus.

Wherefore, having made full return to said alternative writ of mandamus, and shown good and legal reasons why they should not obey the command thereof, they ask to be discharged, with their costs incurred in making this return.

CASPER FETTERS, Sen.,
JOHN CALLAWAY.

CARR & REYNOLDS,
Of Counsel.]

On the 5th of April, 1882, the relator filed a motion to quash said return, for the following reasons:

First. The averments in said return are inconsistent with and contradictory to the admissions made in the record in this case.

Second. The record and judgment in this case forever conclude and debar the defendant in error from denying that the bonds and coupons on which said judgment was rendered were authorized by a vote of two-thirds of the qualified voters of Knox county at an election held pursuant to section 17 of chapter 63 of the General Statutes of Missouri of 1866, then in force; and from averring that they were issued by the County Court of Knox county in pursuance of the charter of the Missouri and Mississippi Railroad Co., on its own mere motion and without the assent and against the will of two-thirds of the qualified voters of said county.

Third. The allegations in the petition filed in the case that a special election was held under section 17 of chapter 63 of the General Statutes of Missouri; and that two-thirds of

the qualified voters of Knox county gave their assent to the subscription of $100,000 on behalf of said county to the capital stock of the Missouri and Mississippi Railroad Co., and the issuing of the bonds on which the relator recovered judgment by default in part payment of said subscription, admitted said allegations to be true, and the same are a bar to the defense set up in said return that said subscription was made and said bonds issued under and by authority of the 13th section of the charter of the Missouri and Mississippi Railroad Co. alone. (P. 11 trans.)

On the 23d day of March, 1883, the Court overruled said motion, and the relator duly excepted. The Court delivered an able opinion, giving its reasons for its ruling. (P. 12 trans.)

On the 11th day of September, 1883, the relator filed an amended answer to said return, denying that said subscription was made and said bonds issued under and pursuant to the 13th section of the charter of the Missouri and Mississippi Railroad Co. alone, and reiterating the allegations that a special election was held under section 17 of chapter 63 of the General Statutes of Missouri, and that two-thirds of the qualified voters of Knox county gave their assent to the subscription of $100,000 on behalf of said county to the capital stock of the Missouri and Mississippi Railroad Co., and the issuing of the bonds on which the relator recovered judgment by default. (P. 17 trans.)

On the 19th day of September, 1883, the defendants filed a reply, putting in issue all the facts alleged in said answer inconsistent with the facts stated in their return. (P. 17 trans.)

The case was tried on the 11th day of October, 1883. On the trial the following issues of fact were submitted to the jury:

First. Was there an election held under the orders of the County Court read in evidence, and did two-thirds of the qualified voters, voting at said election, cast their votes in favor of the subscription by the County Court to the stock mentioned in said orders? Whether or not the required number of voters cast their votes at said election, if held, is conclusively established by the records of the county, behind which no inquiry of fact is permissible.

Second. Was the subscription to stock in the railroad company actually made, not as recited in said bonds under the charter of the Missouri and Mississippi Railroad Co., but under the general law whereby the authority to make said subscription and issue bonds therefor was dependent on the vote of the people? In other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bond were made through mistake or inadvertence.

On the trial the original petition filed in the case, the summons, the marshal's return, and the record containing the judgment by default were introduced in evidence. They sustain the allegations in the information, the alternative writ of mandamus, and the amended answer to the defendant's return. (PP. 25, 26, 27, 28 trans.)

Also one of the bonds filed with the petition, which contains the following recital, viz.:

"This bond being issued under and pursuant to order of the County Court of Knox county for subscription to the stock of the Missouri and Mississippi Railroad Co., as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Co., approved February 20, 1865.'" (P. 28 trans.)

Also sections 1, 7 and 13 of the charter of the Missouri and Mississippi Railroad Co.

Also the order of the County Court of Knox county, made on the 6th day of February, 1867, and the amended order of March 4, 1867, authorizing a special election to be held on the 12th day of March, 1867, to ascertain the sense of the qualified voters of Knox county as to whether they do authorize the County Court of said county to subscribe stock to the amount of $100,000.

First. "In *any* railroad company which may construct a railroad running from West Quincy in this State, thence West through Knox county, and running through the county seat of said Knox county to some point on the Missouri river.

Second. Or in a company which may construct a railroad running from Alexandria, in this State, southwest through Knox county, and through Edina, the county seat of said Knox county, thence west so as to intersect the North Missouri railroad at or near Macon city.

Third. Or in *any other* railroad company which may duly organize under the laws of this State, and which may construct a railroad running through Knox county, and through Edina

to Quincy, Ill., or Macon City, Mo., or to some point on the Mississippi or Missouri river, the stock to be taken to be subject to the conditions that it shall be payable in county bonds bearing 7 per cent. interest and running ten years, and that all moneys arising from the sale of said bonds shall be expended in the construction of a railroad within the county of Knox aforesaid; and further ordered by the Court that the ballots or tickets voted will be marked as follows, viz.:

Shall the county subscribe $100,000 to the railroad? Yes.

Shall the county subscribe $100,000 to the railroad? No.

The defendant objected to the reading of said amended order in evidence, on the ground that no legal notice could be given before the day of election. (PP. 29, 30, 31 trans.)

The relator read in evidence an entry from the record of the proceedings of the County Court, made *in vacation* by the Clerk, a copy of a certificate given by himself and two justices of the peace, that 510 votes had been cast in favor of subscription and 98 votes against it. The defendant objected to the reading of said entry in evidence for the following reasons, viz.:

First. Because it was *a copy*, and not the original certificate, and the absence of the original was not accounted for.

Second. Because there is no evidence that *the County Court itself passed upon the validity of said election.*

Third. Because the Clerk of the County Court *had no authority* to copy said certificate into the records of the County Court. (P. 32 trans.)

The relator also read in evidence the order of the County Court, made on the 13th day of May, 1867, authorizing the president justice thereof to subscribe on behalf of Knox county 1,000 shares in the capital stock of the Missouri and Mississippi Railroad Co. The order describes the bonds to be issued, the rate of interest, and when and where they were to be payable; but it does not purport to be made under or by authority of said special election or section 17 of chapter 63 of the General Statutes of Missouri. (PP. 32, 33.)

The relator showed from the records of the County Court that it had every year, after making said subscription, levied an annual tax, ranging from 25 cents to 75 cents on the $100 valuation to pay interest on said bonds, until the decision of the Supreme Court of Missouri in 1874, in the case of the State, *ex rel.* v. Shortridge, 56 Mo. 126; since then it has annually levied one-twentieth of 1 per cent. (P. 33 trans.)

The relator introduced W. F. Plummer, who testified that he was one of the justices of the County Court when the subscription was made and the bonds issued; that it was the *intention to make the subscription* under the vote; that he knew there were two laws—the one the General Statutes of the State and the other the charter of the Missouri and Mississippi railroad Co.—under which the County Court could make the subscription and issue bonds in payment. That the former law required an election to be held and the assent of two-thirds of the qualified voters of the county before the subscription could be made and bonds issued; and that the latter did not require any election at all to be held to authorize the county to subscribe and issue bonds in payment of the

subscription. That he signed the bonds issued in payment of the subscription of $100,000 as presiding justice of the County Court. That he had read the bonds before he signed them, and he knew that they contained the recital that they were "issued under and pursuant to the order of the County Court of Knox county for subscription to the stock of the Missouri and Mississippi Railroad Co., as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Co.,' approved February 20, 1865." (PP. 39, 40, 50, 51, 52, 53 trans.)

Relator next introduced A. L. Gilstrap, who testified that he was president of the Missouri and Mississippi Railroad Co. at the time Knox county subscribed the $100,000. He produced the journal of the proceedings of the board of directors of said company, from which he read a resolution of said board, adopted at a meeting held on the 13th day of May, 1867, at the town of Edina (the county seat of Knox county), accepting the subscription to the capital stock of said company that day made by said County Court; and a resolution appointing himself and two others a committee to draw up forms, *inter alia*, of bonds to be issued by counties to said company.

That he had drawn up a form for such bonds; that in Macon county, where he resided, a subscription payable in bonds had already been made by the County Court of said county without taking a vote of the people; that he drew up a form applicable to that case; that the bonds before the Court in this case are in the form drawn by him. A bond of the county of Macon, being produced in evidence, was found

to be, *mutatis mutandis*, the same form as those of Knox. Witness was of opinion at the time this subscription was made that the County Court had power to subscribe under the charter without a vote of the people.

It was admitted that the decision of the Supreme Court of Missouri in the case of the State *ex rel.* the Missouri and Mississippi Railroad Co. vs. the County Court of Macon county, reported in 41st Mo. Reports, p. 453, was promulgated October 25, 1867.

This case holds that the assent of two-thirds of the qualified voters of the county is not necessary when the subscription is made under the authority of the charter of the Missouri and Mississippi Railroad Co.

The fifty-eight bonds described in the first paragraph of of relator's petition were issued in pursuance of the order of subscription made May 13, 1867; and the remainder of the relator's bonds were issued under the order of said County Court, made on the 2d day of May, 1870. (P. 53, 54 trans.)

Under the charge of the Court the jury found on the first issue submitted, Yes; and on the second issue, No. Thereupon the Court rendered judgment that the return made to the alternative writ of mandamus was sufficient, and that the defendant had shown good and sufficient cause why a peremptory writ should not issue, as prayed for. (P. 56, trans.)

The case is brought to this Court by writ of error.

BRIEF AND ARGUMENT.

The defendants make the following points and cite the following authorities in support of the judgment of the Court below.

I.

There were two laws under which the subscription could be made, and the bonds in question issued in payment of said subscription by Knox County to the Missouri and Mississippi Railroad Company. The one was the charter of said railroad Company, and the other was the general railroad law.

Session Acts of Missouri, 1865, page 88.

Sections 17 and 18 General Statutes of Missouri, 1865, page 338.

United States vs. Macon County Court, 99 U. S., 582.

State *ex rel.* Mo. & Miss. R. R. Co. vs. Macon County Court, 41 Mo., 453.

Under the charter of the Missouri and Mississippi Railroad Company the County Court of Knox County could make a valid subscription to said company without the assent of two-thirds of the qualified voters of said County.

State, etc. vs. Macon Co. Court, 41 Mo., 453.

Co. of Callaway vs. Foster, 93 U. S., 567.

U. S. vs. Macon County Court. 99 Id., 582.

Under the general railroad law it was not lawful for the County Court of Knox County, or any other County, to subscribe to the capital stock of any railroad company,

without the assent of two-thirds of the qualified voters of such County.

Section 17, Gen. Stats. Mo. P. 338.

If the subscription was made and the bonds issued under the charter of the Missouri and Mississippi Railroad Company, then the County Court of Knox County was restricted in levying "a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

Section 13 of Session Acts Mo., 1865, P. 88.

But if the subscription was made with the assent of two-thirds of the qualified voters of the County, and the bonds were issued in payment of said subscription, then it became "the duty of the County Court making such subscription * * to levy a special tax upon all property made taxable by law for County purposes * * * to pay such installments;" and there is no restriction upon the authority of the County Court in levying such special tax as to the amount it may levy.

Section 18 Gen. Stats. Mo., P. 338.

II.

Only *parties* and *privies* are estopped by a judgment.

Stacey vs. Thrasher, 6 How., 44.

The defendants were neither *parties* nor *privies* to the judgment which the relator recovered against Knox County. They had no right to call witnesses to testify in their favor, to cross-examine the witnesses introduced by the opposite side; to control the defense, or to sue out a

writ of error if judgment was rendered against them. They had no day in Court; and they are *not estopped* from setting up the actual contract which culminated in the County Court of Knox County subscribing $100,000 to the capital stock of the Missouri and Mississippi Railroad Company, on the 9th day of June, 1867, and issuing the bonds upon which the relator recovered judgment in part payment of said subscription. They are not disputing the validity of said bonds. They admit their validity; nor are they disputing the validity of the judgment rendered on said bonds. They admit that it conclusively fixes the amount of the indebtedness of Knox County to the relator. But they say that, as they were not parties to said judgment, they *are not estopped* from showing that the allegations in the relator's petition, upon which he recovered said judgment by default, are false.

Hale vs. Finch, 104 U. S., 261.
Railroad Co. vs. Nat. Bank, 102 Id., 14.
Wood vs. Davis, 7 Cranch, 271.

There is no finding in this judgment that there was a special election held on the 12th day of March, 1867; that two-thirds of the qualified voters of Knox County gave their assent to the County Court of Knox County to subscribe on behalf of said County $100,000 to the capital stock of the Missouri and Mississippi Railroad Company; and that said subscription was made and the relator's bonds issued under and pursuant to said assent. And there is no direction or order in said judgment that the County Court of Knox County should levy a special tax under the 18th section of chapter 63 of the General Statutes of Missouri. It

is only an ordinary judgment for the recovery of $77,374.46 and costs, with an order for an ordinary execution. Now, if Knox County had property subject to execution, the relator could have collected his judgment. But the return to the alternative writ of mandamus shows that it did not have any property subject to execution. Hence, the necessity for another judgment requiring the defendants, in their capacity of Justices of Knox County Court to levy a special tax under said section of the General Statutes to pay said judgment. This would be a very different judgment from the relator's present judgment; and it would be much more efficient in collecting the money necessary to pay it than the present judgment. In the one case he is only entitled to have a tax of one-twentieth of one per cent. levied to pay it; in the other case he would be entitled to have a special tax levied large enough to pay the whole judgment.

The foregoing authorities conclusively establish the proposition that the defendants were neither *parties* nor *privies* to the judgment by default which the relator recovered against Knox County. And being neither parties nor privies, they are not estopped from denying the false allegations in the relator's petition, upon which he recovered said judgment.

Even if the defendants had been parties to said action in which said judgment was recovered, they would not be estopped from showing the actual contract between Knox County on one side and the Missouri and Mississippi Railroad Company and the holders of the bonds issued to it under and in pursuance of said contract on the other side. It has already been shown that the County Court of Knox

County had no authority or power to subscribe to the capital stock of the Missouri and Mississippi Railroad Company under the General Statutes of Missouri without the assent of two-thirds of the qualified voters of the County. And if the County Court had put such a recital into the bonds, it could not by such false recital create an obligation to levy a tax under the General Statutues, and thereby estop the defendants from showing that the subscription was made and the bonds issued under the charter of the Missouri and Mississippi Railroad Company. Rights cannot be created and duties imposed by false recitals, where there is a total want of power.

Carroll County vs. Smith, 111 U. S., 556.
School District vs. Stone, 106 Id., 183.
Norton vs. Shelby County, 118 Id., 425.
Daviess County vs. Dickinson, 117 Id., 657.

The defendants affirm that they are not estopped by the relator's judgment from showing that the subscription was made under and by authority of the charter of the Missouri and Mississippi Railroad Company; and if so, then that it was not made under and pursuant to the special election held on the 12th of March, 1867.

The judgment by default was rendered on a false allegation of facts. The default only admitted the facts material to a recovery. The allegation that an election had been held; that two-thirds of the qualified voters of Knox County had assented to the subscription, and that the subscription had been made and the bonds issued in pursuance of said election were immaterial and not necessary to a recovery. The relator could not *create* a right to

have a special tax levied sufficient to pay his judgment, by making this unnecessary and false allegation of facts in his petition for the recovery of judgment on his bonds. The allegation was made at the wrong time and in the wrong pleading. It was premature and altogether futile; and the defendants were not estopped to deny and disprove the facts upon which the relator seeks to foist and fasten upon the tax payers of Knox County an obligation to pay a debt contracted without their assent, contrary to the actual contract between the parties; and in denying and disproving the facts falsely alleged they do not impeach the validity of the relator's bonds, nor the judgment recovered on them. But they only disprove the facts falsely alleged, upon which the relator bases his right to have a special tax levied sufficient to pay his judgment. They have a clear and undoubted right to disprove these facts and to show the actual contract between the parties.

Davis vs. Brown, 94 U. S., 428.
Packet Company vs. Sickles, 5 Wall., 580.

The defendants are the Justices of Knox County Court. Although their return is sworn to, still, as they were making said return in their official capacity and being under oath, it stands like a sheriff's return, as true, unless contradicted by superior evidence. If the relator wishes to controvert the truth of the facts stated in the return he must traverse all or any of the material facts contained in such return, and the person making the return shall reply, take issue or demur to the pleading of the party prosecuting such writ. In other words the pleadings and proceedings, under the statute of Missouri in regard to mandamus, are in the

same form and conducted in the same manner as a suit against a sheriff for making a false return.

§§ 3255–3259 Rev. Stats. Mo. P. 552.

The *onus* was on the *relator* to contradict the facts stated in the return by superior evidence. Does the evidence adduced by the relator do this? It is affirmed that it does not. Let us examine it. There is no evidence that any *notice* of the special election to be held on the 12th day of March, 1867, was ever given. The original order for holding an election was amended on the 4th day of March, 1867. No *notice* was, by either the original or amended order, required to be given, and no *legal* notice could have been given between the time of making said order and the day fixed for holding said election.

Crow vs. Oxford, 119 U. S., 215.

Three propositions were submitted to the voters. There is no evidence how the voters cast their votes on each proposition. Vide p. 13 of statement ante.

The *original* certificate, given by the Clerk of the County Court and two Justices of the Peace who canvassed the votes, was not produced in evidence, and the proper foundation was not laid for introducing *secondary* evidence, for the reasons stated on p. 14 of statement ante.

Crow vs. Oxford, 119 U. S., 215.
Daviess County vs. Dickinson, 117 Id., 657.
Dixon County vs. Field, 111 Id., 83.

The order of the County Court, made on the 13th day of May, 1867, authorizing the presiding Justice of the County Court to subscribe, for and in the name of Knox County,

$100,000 to the capital stock of the Missouri and Mississippi Railroad Company, does not refer to the special election which had been held on the 12th day of March, 1867; nor does it recite that it was made with the assent of two-thirds of the qualified voters of Knox County. And the fact that the bonds issued in payment of said subscription were issued under said special election, or with the assent of two-thirds of the qualified voters of Knox County, is completely negatived by the following recital contained in them, viz:

"This bond being issued under and pursuant to order of the County Court of Knox County for subscription to the stock of the Missouri and Mississippi Railroad Company, *as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February* 20, 1865."

When the well-settled canon of construction, *expressio unius est exclusio alterius,* is applied to this recital it is conclusive that the subscription was made and the relator's bonds issued in part payment thereof, under and by authority of the 13th section of the charter of the Missouri and Mississippi Railroad Company only.

United States vs. Macon County Court, 99, U. S. 582.

Estoppels must estop both parties or they will not estop either party. They must be mutual.

Bigelow on Estoppel, 98 (4th ed.)
Petrie vs. Nuttall, 11 Excheq., 569.
Railroad Co. vs. National Bank, 102 U. S., 14.
Carroll County vs. Smith, 111 Id. 562.,
School District vs. Stone, 106 Id., 183.

There is no doubt that the recital that the relator's bonds were issued under the charter of the Missouri and Mississippi Railroad Company estop Knox County from setting up anything to the contrary. And as said recital estops Knox County so likewise it estops the relator. If it estops the former then it must estop the latter.

The judgment which the relator recovered against Knox County is to be taken as unquestioned only when it can be carried into effect by virtue of the order or direction contained within itself.

The relator's information filed in this case shows that Knox County "has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law." The defendant's return admits this allegation to be true. The relator's judgment cannot be carried into effect by virtue of the order or direction contained within itself. The relator has resorted to this proceeding by mandamus to compel the defendants, as Justices of Knox County Court, to levy a special tax sufficient to pay his judgment. In his information filed to obtain a writ of mandamus he states the facts upon which he recovered said judgment, and he reiterates the same facts in the alternative writ of mandamus issued in this case, and the defendants are commanded to levy a special tax to pay said judgment, or "show cause * * why they refuse so to do." (P. 5 tran.) Having partially opened the record in the case in which he recovered his judgment he is estopped from objecting to the defendants treating the whole record as opened. This is the practice in courts of equity where a complainant seeks the means of carrying into effect a decree or judgment ren-

dered in another litigation between the same parties, or parties claiming under them when the decree or judgment does not provide the means of execution. In such case the Court will look into the original cause of action and ascertain whether the complainant is entitled to have the Court aid him in carrying into effect the original decree or judgment. The general rule of *res judicata* has the foregoing qualification.

Bigelow on Estoppel, 96, 97 (4th ed.).

O'Connell vs. McNamara, 3 Drury & W., 411.

Hamilton vs. Houghton, 2 Bligh, 169.

Johnson vs. Northey, Finch, Prec., Ch. 134.

Bean vs. Smith, 2 Mason, 299.

The Board of Directors of the Missouri and Mississippi Railroad Company held a meeting at Edina, the county seat of Knox County, the same day that the County Court made the order subscribing the $100,000 to the capital stock of said company, and passed a resolution accepting said subscription, no reference being made to the special election held on the 12th day of March, 1867, or that the assent of two-thirds of the qualified voters of Knox County entered into the subscription. The order of the County Court and the resolution of acceptance made the contract complete between the County of Knox on the one side and the Missouri and Mississippi Railroad Company on the other side. The relator is a *privy* to this contract. (P. 16 *ante.*)

The election held was not a legal election. The County Court was the proper tribunal to pass on its legality.

As it never acted under the authority of said election the fair presumption is that the County Court, in the exer-

cise of its judgment, regarded said election as illegal. This presumption is strengthened by the opinion which Gilstrap, the President of the M. & M. R. R. Co., held, that the County Court had under the charter of said company, plenary power to make said subscription without the assent of two-thirds of the qualified voters of the county. (P. 16 *ante.*) He was a lawyer, and drew the form of the bond containing the recital that it was issued "for subscription to the stock of the Missouri and Mississippi Railroad Company *as authorized by an act of the General Assembly of the State of Missouri, entitled, 'An act to incorporate the Missouri and Mississippi Railroad Company,'* approved February 20th, 1865."

Gilstrap was counsel in the case of the State of Missouri *ex rel.* The Missouri and Mississippi Railroad Co. vs. Macon County Court (41 Mo. 453), promulgated October 25th, 1867 (p. 17 *ante.*), in which the Supreme Court of Missouri fully sustained Gilstrap's opinion as to the power of the County Court to subscribe to the capital stock of his company without the assent of two-thirds of the qualified voters of the county. And the presumption is still further strengthened by the fact that Knox County never issued any bonds until the first day of February, 1868, more than three months after the promulgation of the decision of the Supreme Court of Missouri in the Macon County case. (P. 28 Trans.)

Moreover, there is not a *scintilla* of evidence in the record that the County Court ever held said election to be legal, or that it passed on its legality or validity at all. It was the proper tribunal to do so. Even if the special election held on the 12th day of March, 1867, had been a *legal* election, the

proposition voted on was never *accepted* or acted on by the County Court, and until it was accepted and acted on legally, it amounted to no more than waste paper. A Court of record can only speak by its record.

County of Macon vs. Shores, 97 U. S., 272.

The relator's own bonds showed on their face that they had been issued under and by authority of the charter of the Missouri and Mississippi Railroad Company. They imparted full notice to him of the authority under which they had been issued. If he had followed up the notice he would have ascertained that the County Court of Knox County is restricted in levying "a tax to pay the same not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year."

State vs. Shortridge, 56 Mo., 126.
United States vs. Macon County Court, 99 U. S., 582.
State vs. Macon County Court, 68 Mo., 29.

The defendants, as Justices of Knox County Court, are officers of the State of Missouri with their powers and duties well defined.

Reardon vs. St. Louis County, 36 Mo., 561.
St. Louis, etc. vs. County Court, 34 Id., 546.
Steines vs. Franklin County, 48 Id., 188.
Ray County vs. Bentley, 49 Id., 236.
Ralls County Court vs. United States, 105 U. S., 733.
Anthony vs. County of Jasper, 101 Id., 693.

The County Court of Knox County has annually levied a special tax of one-twentieth of one per cent as authorized by the charter of the Missouri and Mississippi Railroad Com-

pany. It has fully performed the contract between the County of Knox and the holders of the bonds issued by said county to the Missouri and Mississippi Railroad Company. It has no power or authority to levy any other tax to pay said bonds or the relator's judgment recovered on said bonds than said special tax of one-twentieth of one per cent.

Says Chief Justice Waite in delivering the opinion of this Court in the case of the United States vs. County of Macon. (99 U. S., 591): "We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. *We can not create new rights or confer new powers.* All we can do is to bring existing powers into operation."

Supervisors vs. United States, 18 Wall, 71.

Under the contract, as evidenced by the recital in the relator's bonds, he is only entitled to an annual levy of a special tax of one-twentieth of one per cent to pay his bonds. Does a false allegation of facts upon which no issue was joined and upon which he recovered his judgment, entitle him in direct contravention of the contract under which his bonds were issued, to have a special tax levied sufficient to pay his judgment? In other words, does such a judgment forever estop the defendants from showing the actual contract between the County of Knox and the relator as the holder of its bonds? It is affirmed that it does not.

Davis vs. Brown, 94 U. S., 428.
Cromell vs. Sac Co., 94 Id., 352.

Says Mr. Chief Justice Waite in delivering the opinion of the Court in the case of the United States vs. County of

Macon. (99 U. S., p. 591): "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, *but it gives him no new rights in respect to the means of payment.*"

See the able opinion delivered by Circuit Judge McCrary, when the relator's motion to quash the defendants' return was overruled. (P. 13, Trans.)

Ralls County Court vs. United States, 105 U. S., 733.

Even if there had been a legal election held and the assent of two-thirds of the qualified voters given, still that does not sustain the relator's claim, as the County Court never acted under it.

Aspinwall vs. Com'rs of Daviess Co., 22 How., 364.
Norton vs. Shelby County, 118 U. S., 425.
Wadsworth vs. Supervisors, 102 Id., 534.

And it was not bound to act under the assent of two-thirds of the qualified voters of the county. It was a mere naked authority to subscribe which the County Court could exercise at its discretion. The record shows conclusively that it did not exercise or act under this authority.

Wadsworth vs. Supervisors, *Supra.*

The relator could not have been influenced in purchasing the bonds in question by the pretended election held on the 12th day of March, 1867, as he did not know anything about it when he purchased said bonds. The bonds on their face recited that they were issued under the charter of the Missouri and Mississippi Railroad Company. This recital ex-

pressly negatives the fact that they were issued under the general railroad law.

Spurlock vs. Sproule, 72 Mo., 504.

The levy of taxes sufficient to pay the interest on the bonds and the payment of interest thereon from the time the bonds were issued till the year 1874, when the County Court had no legal authority to levy a tax of more than one-twentieth of one per cent did not have the effect of showing that the bonds were issued under the general railroad law instead of the charter of the Missouri and Mississippi Railroad Company, and the County of Knox could not be estopped by such illegal levy of taxes. As soon as the Supreme Court of Missouri decided in 1874 that the County Court of Macon County —and the Knox County bonds were the same in form, *mutatis mutandis*, as the Macon County bonds, and issued under the same charter—had no legal authority to levy any other or greater tax than one-twentieth of one per cent, the County Court of Knox County ceased to levy any other or greater tax than one-twentieth of one per cent. This it has levied every year.

Daviess County vs. Dickinson, 117 U. S. 657.
Merchants' Bank vs. Bergen County, 115 Id. 384.
Marsh vs. Fulton County, 10 Wall. 676.
Norton vs. Shelby County, 118 U. S. 425.

If the defendants were required by mandamus to levy a special tax to pay the relator's judgment, it would be a direct violation of the laws of the State of Missouri.

III.

"Giving the relator the benefit of every inference that could have been fairly drawn from the evidence, written and oral, it was insufficient to authorize a verdict in his favor Such being the case, a peremptory instruction for the defendants was proper."

Marshall vs. Hubbard, 117 U. S. 413.

In every aspect in which this case can be viewed, there was no error committed on the trial; the judgment is for the right party, and it should be affirmed.

JAMES CARR AND
GEO. D. REYNOLDS,
For Defendants.